No. 85-1089

Supreme Court, U.S.
FILED
DEC 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

Supreme Court of the United States

October Term, 1985

JOSEPH C. GALLO,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

I. What Constitutes Prejudicial Spill Over Where a Defendant Is Sentenced to Life Imprisonment Plus 138 Years on a Conviction for Continuing Criminal Enterprise, RICO and Substantive Counts Where He Is Forced to Proceed to Trial Ten Days After Arraignment on a Superseding Indictment in Violation of His Sixth Amendment Right to Effective Assistance of Counsel When the Superseding Indictment Added the New Charge of Racketeer Influenced Corrupt Organizations Alleging, Inter Alia, Multiple Murders and Gambling in Support of the Identical Enterprise Alleged in the Original Charge of Continuing Criminal Enterprise.

II. Whether the Court of Appeals Finding of a Denial of the Right to Effective Assistance of Counsel as to One Offense, RICO, Requires Reversal as to All Offenses Where the Evidence and the Offenses Alleged Were Inexorably Intertwined and Proof of the RICO Offense Was Offered to Prove One or More Other Offenses Including Continuing Criminal Enterprise and Whether Affirmance of the Petitioner's Other Convictions Is Justified Under the Concurrent Sentence Doctrine.

III. Whether a Per Se Violation of 18 U.S.C. 3161 (c) (2), the Speedy Trial Act, as to a New and Distinct Charge Added to a Superseding Indictment Requires Reversal of All Convictions Therein Where Proof of the New Offense Charged in the Superseding Indictment Was Also Used to Prove the Original Offenses.

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OPINION BELOW

The original opinion of the Sixth Circuit Court of Appeals in *United States v. Joseph C. Gallo, et al.*, 763 F.2d 1504 (1985) is appended hereto as Appendix A. The opinion below relating to the Petitioner was filed on May 29, 1985. The judgment of the Court of Appeals became final on September 16, 1985, the date when the codefendants' petitions for rehearing were denied. On November 13, 1985, Justice O'Conner granted Petitioner's Application for Extension to File this Petition for a Writ of Certiorari until December 15, 1985.

JURISDICTION

The jurisdiction of this court is invoked pursuant to Title 28 United States Code, Section 1254(1), which provides for review by Writ of Certiorari of all cases decided by the Courts of Appeal. The Petitioner also contends that the Opinion of the Court of Appeals for the Sixth Circuit is in conflict with the decisions of the Courts of Appeal for the Second, Fourth, Seventh and Ninth Circuits.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;

to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. 3161(c), The Speedy Trial Act Provides

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

18 U.S.C. 1962. Racketeer Influenced Corrupt Organizations Act

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

21 U.S.C. 848. Continuing Criminal Enterprise

(a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more

prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in section 853 of this title.

Continuing criminal enterprise defined.

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

1. he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

2. such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

STATEMENT

1. Pretrial Proceedings

On July 6, 1982, a seventy-four count indictment was returned by the Grand Jury for the Northern District of Ohio, Eastern Division. The indictment charged seven defendants: Petitioner, Joseph C. Gallo, and codefendants,

Kevin McTaggart, Hartmut Grawe, Frederick Grawe, Angelo Lonardo, Thomas Sinito and Carmen Zagaria.

Count 1 alleged a violation of 18 U.S.C. Section 1962(c) and (d), The Racketeer Influenced Corrupt Organizations Act, RICO. Petitioner Joseph Gallo was neither charged nor mentioned in the RICO count. The enterprise was described as "a group of persons associated in fact to commit acts of murder and violence . . . to facilitate the operation of a narcotics trafficking and gambling enterprise . . .," and that they were part of a "murder, gambling and drug distribution net work [sic] controlled by 'the Cleveland organized crime family,' which . . . was known as 'the Outfit,' or as 'the organization,' or simply as 'the Mafia,' . . ."

The manner in which each defendant *excluding the Petitioner*, was alleged to have participated in the affairs of the RICO enterprise was set forth in the commission of eight separate or predicate acts or offenses in furtherance of the conspiracy.

Count 2 charged all seven defendants including the Petitioner with engaging in a Continuing Criminal Enterprise, 21 U.S.C. Section 848, CCE. Codefendant Zagaria was described as the "head of the enterprise" or, alternately, as the "principal supervisor of the enterprise" in both the RICO and CCE counts.

Counts 3 through 23 charged all of the defendants with violations of 18 U.S.C. Section 1952, Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises, ITAR, and 18 U.S.C. Section 2, Principals.

Counts 24 through 39 charged all of the defendants with various controlled substance possession counts, 21 U.S.C. Section 841(a)(1) and 18 U.S.C. Section 2.

Counts 40 through 70 charged each of the defendants with Unlawful Use of a Communication Facility, 21 U.S.C. Section 843(b) and 18 U.S.C. Section 2.

Counts 71 through 74 charged Internal Revenue violations against only Defendant Zagaria.

On July 8, 1982, the government's prearraignment motion to deny bail to all defendants herein was allowed *nunc pro tunc.*

Gallo, already incarcerated pursuant to a state court conviction, was arraigned on July 8, 1982 and on August 11, 1982, attorney Stewart Mandel was appointed to represent Gallo pursuant to the Criminal Justice Act.

On September 22, 1982, codefendant Carmen Zagaria, until then a fugitive, was arrested and soon thereafter became a government witness.

Following this change in events, on October 27, 1982, a superseding indictment was filed. Because Zagaria, the primary target of the first indictment and a principal figure in the criminal indictment had now become a government witness, he was now referred to as an "unindicted co-conspirator." He remained the sole defendant on the original indictment.

The superseding indictment, as to Petitioner Gallo, was the first notice that he had that he would be forced to defend against charges of RICO murder and gambling and described him as a manager, financier, and protector of the enterprise whose purpose it was to carry on narcotic and gambling activities. Paragraph 4 alleged that the Petitioner, as well as other defendants, "occupied positions as managers, organizers, and directors of this narcotics enterprise with respect to over seventy unindicted co-conspirators who were affiliated with this criminal orga-

nization." The RICO count in the superseding indictment detailed six murders as "predicate offenses in furtherance of the RICO conspiracy." The Petitioner was specifically charged with the aggravated murders of Curtis Conley and Joseph Giaimo and with supervising a gambling business from July 25, 1978 to the date of the superseding indictment.

The Petitioner remained charged in the remaining Count 2, CCE and various substantive offenses charged in Counts 3 through 70. Counts 71 through 74, the Zagaria tax violation counts, were not included in the superseding indictment.

The Petitioner was arraigned on the superseding indictment on October 28, 1982. Prior to the filing of the superseding indictment, a trial date of November 8, 1982 had been set. On November 1, 1982, the Petitioner's attorney filed a motion to continue the trial date so that he could properly prepare the new RICO charge.

On November 3, 1982, another motion for a continuance was filed on behalf of the Petitioner specifying that ". . . without additional time for preparation, counsel feels that the defendant will be deprived of his constitutional right to effective assistance of counsel and therefore, a failure of justice may occur." In his motion Attorney Mandel represented that ". . . Additional time [was] needed to properly analyze the indictment, prepare any necessary motions, and to further investigate the additional charge." On November 8, 1983, counsel for the Petitioner again orally moved for a continuance, as did counsel for McTaggart and Frederick Grawe. These motions were all summarily denied. On November 15, 1982, the Petitioner filed a motion to discharge Mr. Mandel, his court appointed counsel, and to proceed *pro se,* asserting

Mr. Mandel's lack of preparation for trial. This motion was granted in part, however, his appointed counsel was retained in an advisory capacity.[1] Trial as to all defendants commenced on November 8, 1982. At various times throughout the proceedings both the Petitioner and Mr. Mandel repeated their requests for a continuance upon the aforementioned grounds. All such motions were denied.

The Petitioner was convicted on Counts 1 and 2, RICO and CCE and 24 substantive offenses. He was sentenced to life imprisonment on the CCE offense, a concurrent sentence of 20 years on the RICO offense and a total of 118 years on the substantive offenses, consecutive to the CCE and RICO sentences.

2. Allegations in the Original Indictment and Superseding Indictment.

While Counts 1 and 2 charged two very distinct offenses, evidence was adduced at trial without designation as to the specific count it was directed toward. The court consistently refused requests of all defense counsel to instruct the jury in this regard pursuant to Rule 105, Federal Rules of Evidence.

For purposes of comparison and ease of understanding the impact upon the Petitioner, Count 2 will be discussed first in conjunction with the substantive offenses charged in Counts 3 through 70.

A. The continuing criminal enterprise offense.

Count 2 of both the original and superseding indictments alleged a violation of 21 U.S.C. 848, Continuing

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1. During a later stage in the proceedings the Petitioner relented to the predicament in which he found himself and allowed his appointed "advisory counsel" to resume the role of his defense attorney and to carry out the normal functions of defense counsel.

Criminal Enterprise, CCE. Generally Count 2 charged that each defendant including the Petitioner violated 18 U.S.C. 841(a)(1) and 18 U.S.C. 843(b) in a continuing series of violations in concert with at least five other persons, acting as organizers, supervisors and managers, and thereby derived substantial income. Further, it was alleged, the defendants would traffick in illegal drugs, cross state lines, make use of telephones, bribe state and local police officers and conceal the income from said activities all in furtherance of and to facilitate said conspiracy. It should be noted that nowhere does it appear that the Petitioner Joseph C. Gallo himself is alleged in either the original or superseding charge of CCE to have committed any act of violence, especially murder, to carry out the ongoing conspiracy charged in Count 2.

The indictment went on to specifically define the role of each defendant as a member of the conspiracy charged in Count 2. As to the Petitioner and certain other defendants Count 2 stated:

> ANGELO LONARDO, as a "Boss" in the Cleveland Organized Crime Family, would supervise the efforts of his two trusted subordinates, THOMAS SINITO and JOSEPH GALLO, in said narcotics enterprise conspiracy. These three also filled the roles of financiers and protectors of the enterprise from encroachment by other competing criminal groups. JOSEPH GALLO and THOMAS SINITO would strive to insulate ANGELO LONARDO from criminal liability by serving as the conduit through which his instructions were relayed to the other members of the conspiracy.

Certain codefendants, namely Frederick and Hartmut Grawe, and Kevin McTaggart, were alleged to have com-

mitted unspecified murders and to have used fear, intimidation, force and violence, all at the direction of Zagaria. The Petitioner was not named as a participant in said violent activities. Again, nowhere in these allegations as to certain codefendants does it appear that the Petitioner is alleged to have committed any act of violence, especially murder, to carry out the ongoing conspiracy charged in Count 2.

Count 2 in the original indictment and superseding indictment are identical as to the Petitioner's alleged role in said conspiracy.

As noted herein, Counts 3 through 70 alleged various substantive violations of the ITAR statute, 18 U.S.C. 1952, possession of controlled substances statute, 18 U.S.C. 841 (a)(1), and telephone statutes, 18 U.S.C. 843(b) and aiding and abetting statute, 18 U.S.C. 2. Counts 3 through 70 were identically duplicated in the superseding indictment as to the Petitioner.

B. The RICO offense.

Count I alleged a violation of 18 U.S.C. 1962(d), RICO Conspiracy. The primary distinction between the original indictment and the superseding indictment is that only the superseding indictment named the Petitioner as a defendant in Count I, RICO. Nowhere in the original RICO charge in the first indictment did the name of the Petitioner appear either as a named defendant, co-conspirator, unindicted co-conspirator, participant in the predicate offenses or otherwise.

The original indictment alleged that the defendants, excluding the Petitioner, conspired to engage in a RICO enterprise through acts of murder and violence. The purpose of the enterprise was to facilitate the operation

of a narcotics trafficking and gambling operation carried out through the aforementioned acts of murder and violence and threats of murder and violence. As with Count 2 the roles of the various defendants were defined. Again, notably absent from the original RICO charge was the name of the Petitioner or a definition of his role in the RICO enterprise.

Upon the filing of the superseding indictment the defendant learned for the first time that he was now charged with the RICO murders of Curtis Conley and Joseph Giaimo and was accused of conducting a gambling operation, all in violation of state and federal laws.

The murder of Conley was alleged to have taken place some time in July of 1980, 2 years and 3 months before the filing of the superseding indictment. The murder of Joseph Giaimo was alleged to have occurred on January 17, 1981, 1 year and 10 months before filing of the superseding indictment. The gambling operation was alleged to have occurred from July 25, 1978 to the date of the indictment, a period of 4 years and 10 months before filing of the superseding indictment.

It was upon these new charges and complex issues of a RICO violation, allegedly committed in furtherance of a drug trafficking and a gambling enterprise, that the Petitioner was forced to defend himself ten days after arraignment.

3. The Inter-Relation of the Charges and Prejudicial Spill Over of Evidence at Trial.

The RICO charge alleged that the defendants as a group, were known as the "murder, gambling and drug distribution network."

A. The enterprise.

As noted hereinbefore, the "enterprise" in the charges of RICO and Continuing Criminal Enterprise were one and the same upon filing of the superseding indictment. The RICO enterprise was defined in the indictment as:

> . . . a group of persons associated in fact to commit acts of murder and violence, and to threaten acts of murder and violence, in violation of the laws of the State of Ohio, in order to facilitate the operation of a narcotics and gambling enterprise . . . to enhance the collection of debts owed the enterprise in connection with gambling and narcotics . . . by killing potential police informants and competing drug traffickers in order to preserve the enterprise's control of the narcotics trafficking business.

The drug laws allegedly violated in both the RICO offense as predicate and overt acts and the Continuing Criminal Enterprise offense were also charged by reference to the substantive counts of the indictment as violations of 21 U.S.C. 841(a)(1), 21 U.S.C. 843(b), and 18 U.S.C. 1952(a).

The enterprise is outlined in the CCE charge by reference to 21 U.S.C. 848 wherein an enterprise is defined as a violation of certain felony drug laws as part of a continuing series of said violations undertaken in concert with five or more persons and where a defendant, as an organizer or supervisor of said persons, has obtained substantial income therefrom. Each defendant named in Count 1, RICO was also named in Count 2, CCE.

The RICO count and the CCE count both alleged that Carmen Zagaria would direct day to day operations as the head or principal supervisor of the enterprise and ensure

loyalty through the acts of Frederick Grawe, Hartmut Grawe and Kevin McTaggart. Both offenses alleged that the Petitioner, Joseph Gallo, acted as a manager, financier, and protector of the enterprise. Both counts alleged that all defendants occupied positions of, or functioned as organizers and directors of this narcotics enterprise ". . . with respect to over 70 unindicted co-conspirators who were affiliated with this criminal organization."

Finally, the dates of the existence of the RICO conspiracy were allegedly from March, 1978 to the date of the filing of the indictment. The dates of the existence of the CCE conspiracy were specified as being from March, 1978 up to the date of the filing of the indictment, identical to the RICO charge. Each and every substantive offense charged in Counts 3 through 70 likewise is alleged to have occurred by one or more named defendants and/or unindicted co-conspirators between the above-specified dates.

Evidence at trial as to the enterprise was made without distinction between separate offenses charged. The evidence presented by the government at trial and adopted by the Sixth Circuit in its opinion was that the defendants combined allegedly rival factions; one faction controlled by Zagaria and the other controlled by Lonardo. Gallo was alleged to be a supervisor of the combined factions, now an "enterprise" engaged in illegal drug and gambling activities.

The enterprise initially began as a combined effort to avoid conflict between the two groups in the running of various gambling operations including barboot, a dice game. During this period the actual operation of various gambling locations shifted and profits were redistributed periodically to satisfy both groups as events demanded.

The Zagaria faction also was already operating a narcotics business with various defendants involved in both gambling and narcotics activities.

Allegedly the Zagaria group then, after establishing a system for the running of its gambling operations, expanded its narcotics operations to the Lonardo group through defendant Sinito.

In late 1979 Zagaria claimed the Petitioner and Sinito asked him if he was interested in joining the "Mafia". This inquiry was allegedly repeated in late 1980 by Sinito and by the Petitioner in the spring of 1981. The combined factions, as noted before, allegedly came to be called, inter alia, the "murder, gambling and drug distribution network."

Thus the enterprise was established in evidence through proof of the RICO offense not originally charged against the Petitioner but against which he was forced to defend himself ten days after arraignment.

B. Murders, violence and threats.

The Petitioner was alleged to have murdered Curtis Conley in July of 1980 and Joseph Giaimo in January of 1980. These offenses were charged in paragraphs (E) and (G) respectively of Count 1, the RICO offense, as predicate acts. The Conley murder was alleged to have been committed "in furtherance of the conspiracy [and] was done because Curtis Conley was a narcotics competitor of said McTaggart," a codefendant of the Petitioner. As to the Giaimo murder, it was alleged to have been committed "in furtherance of the conspiracy, was done to prevent the victim from collecting $560,000.00 which was owed him for marijuana 'fronted' to the enterprise

which it had previously agreed to purchase, and which was subsequently distributed for profit."

Additionally, besides the above noted two predicate acts, four additional murders were charged as against various codefendants, three of which were alleged to have been committed in furtherance of the narcotics enterprise either by specific language of each predicate act or by general reference to the enterprise. Prior to trial the government also notified the Petitioner that it would introduce evidence of an uncharged murder of one David, last name unknown, later identified as David Hardwicke, under the guise of similar acts.

As to threats of violence, paragraph (11) charged codefendants Hartmut Grawe and Kevin McTaggart with intimidation and threats of force against agents of the Federal Bureau of Investigation.

The charge of CCE, alleged that Zagaria assured the loyalty of the defendants and co-conspirators through his "lieutenants" by the use of "fear, intimidation, force, violence and multiple murders." Additionally it alleged that "internal" and "external" security for the enterprise was maintained by certain codefendants excluding the Petitioner by ". . . intimidating prospective witnesses, maintaining discipline within the organization through fear and violence as well as murdering competing drug dealers and suspected police informants."

During the ongoing combined gambling operation the Zagaria group began to use force and violence to ensure continued success of its narcotics operation. These incidents of violence included "rip-offs" of drug associates such as Orville Keith and his eventual murder and the murders of Keith Ritson, suspected of being an informant, and Billie Bostic, a Zagaria gambling associate. Other

evidence disclosed several conversations and plots not alleged in the indictment to kill several other individuals, none of which were carried out.

It was following this chain of events that Zagaria and Sinito, in November of 1978, began to deal narcotics. Allegedly this eventually expanded to include the Petitioner in the financing, purchase and resale of marijuana beginning after a February, 1979 meeting of Sinito and Zagaria.

Zagaria claimed that in June, 1980, he and McTaggart shot and killed Curtis Conley after being told by others, that Conley had wanted to kill them. Although not specifically clear in the evidence McTaggart was allegedly told by the Petitioner of knowledge of a contract on McTaggart's life, the suggestion being Conley had put out said contract.

Zagaria then claimed that he and Hans Grawe killed Joseph Giaimo on January 17, 1981. Allegedly this was done by prior agreement with the Petitioner and Sinito to "rip-off" Giaimo for drugs and to then kill him.

As time went on, as the Government's evidence showed, one David Hardwicke and a David Perrier were also killed, allegedly as part of this wide ranging conspiracy.

C. Gambling.

The Petitioner was charged with being a financier of the enterprise in both the RICO and CCE charges. Additionally the RICO offense alleged that the Petitioner and certain codefendants operated an illegal gambling business in violation of the laws of the State of Ohio and 18 U.S.C. 1955. The RICO offense defined the enterprise, inter-alia, as a gambling and drug distribution network

and further stated that illegal gambling was an objective of the enterprise. The Petitioner was specifically alleged to have carried on an illegal gambling operation with certain codefendants as a predicate act and that Zagaria had entered into a merger with codefendant Sinito "to monopolize the Cleveland illegal drug market and illegal gambling enterprise with profits shared by all."

As noted before in subsection (A), Enterprise, the initial agreement between the Zagaria and Lonardo groups resulted from attempts to eliminate strife over gambling operations. Allegedly the Petitioner and Sinito operated the gambling business on the east side of Cleveland while Zagaria and his group controlled west side operations. Profits, at first, were divided for distribution by Sinito and a Zagaria representative and later, allegedly, the Petitioner assisted in the division of profits.

4. The Decision of the Court of Appeals.

The Sixth Circuit Court of Appeals held, inter alia: 1. The mandatory provisions of 18 U.S.C. 3161(c)(2) are inapplicable to a superseding indictment; 2. the appropriate period for preparation by defendants following a superseding indictment is governed by the discretion of the trial court; 3. granting of the Petitioner's motion for a continuance would not have jeopardized the government's case as to any remaining defendants under the 70-day speedy trial requirements of 18 U.S.C. 3161(c)(1); and that 4. the Petitioner demonstrated prejudice as to Count I, the RICO charge and that the ten days afforded the Petitioner to prepare his defense to a highly complex case constituted an abuse of discretion and violated his Sixth Amendment right to effective assistance of counsel. Citing *Linton v. Perini*, 656 F.2d 207 (6th Cir., 1981) and *United States v. Wirsing*, 719 F.2d 859 (6th Cir., 1983).

The Court of Appeals then went on to find the foregoing violation of the Petitioner's Sixth Amendment right to effective assistance of counsel as not affecting his conviction on Count 2, CCE. This result was obtained by finding no "spill over" or prejudice from his RICO conviction onto his Count 2, CCE conviction and by further finding that the "concurrent sentence" doctrine applied since his conviction on the CCE was longer than his conviction on the RICO count. The Court of Appeals concluded that "There is no demonstrated prejudice in the government's proceeding to prompt trial on the other charges set out in the original indictment." *United States v. Gallo, supra* at p. 1524.

ARGUMENT

I. THE PETITIONER, SERVING A LIFE SENTENCE PLUS 138 YEARS AS A RESULT OF CONVICTIONS FOR CCE, RICO AND SUBSTANTIVE COUNTS WAS PREJUDICED THROUGH DENIAL OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY BEING FORCED TO PROCEED TO TRIAL TEN DAYS AFTER ARRAIGNMENT ON A SUPERSEDING INDICTMENT WHICH ADDED A PREVIOUSLY UNCHARGED OFFENSE OF RICO MURDERS AND GAMBLING IN SUPPORT OF THE IDENTICAL ENTERPRISE ALLEGED IN THE CCE OFFENSE.

It cannot be denied that the evidence used to prosecute the Petitioner on Count 1, RICO, was also used to convict him on the CCE offense. Proof of one offense would necessarily prove the other and vice versa. The Sixth Circuit Court of Appeals in *United States v. Wirsing,*

supra, had occasion to rule on an identical issue. In *Wirsing* the Court found that where the defendant had been indicted for a drug conspiracy offense and later indicted for tax evasion he was denied the effective assistance of counsel when substitute counsel was forced to proceed to trial after only one week of preparation. The Court noted that although the drug conspiracy charge was a relatively simple matter the tax evasion charge, prosecuted under a net worth theory by the government was a complicated matter involving 362 exhibits with "summary witnesses" offered to prove the government's case. Although the defendant in *Wirsing* had previous counsel, as noted by the Court, they had not prepared a defense to the tax offenses. Substitute counsel was unable to obtain, in the allotted one week continuance, a "summary witness" to examine the evidence to determine if error existed in the complex case presented by the government. The Court of Appeals noted that several alternate remedies were available to the Trial Court including a continuance or severance of the tax charges.

The Petitioner presents a more compelling case. First, the RICO and CCE offenses are both complex criminal statutes requiring a thorough understanding by defense counsel to properly defend either one. In the same view, this particular prosecution was further complicated by the fact that over 100 witnesses and numerous exhibits were presented by the government during a three month trial to prove its case. This case was additionally complicated because, at least prior to the superseding indictment, seven separate defendants were charged not only in the aforementioned CCE and RICO (from which the Petitioner was noticeably omitted) but an additional 68 substantive offenses were alleged as to all defendants clearly interrelated to and underlying the overall CCE drug conspiracy charge.

Secondly, only ten days before trial the Petitioner was notified of the necessity of defending a complex RICO offense including two murder charges specifically charged against him and a gambling charge. The Court of Appeals found that denial of a continuance to the Petitioner to defend this offense was clear error and abuse of discretion by the district court. However, the question does not end there. The fact that the RICO enterprise and the CCE enterprise were identical, the indiscriminate use of evidence as to the RICO and CCE offenses and substantive counts and the fact that the RICO murders were all allegedly in furtherance of the narcotic enterprise and conspiracy, demonstrates an overlapping of proof such that evidence of the murders would prove the Petitioner's involvement in the CCE conspiracy. If the trier of fact had any doubts about the Petitioner's alleged involvement in the CCE conspiracy it was clearly influenced by the RICO conspiracy which claimed he was directly responsible for at least two murders and inferentially responsible for several others all in furtherance of the drug enterprise. This tended to implicate the Petitioner through guilt by association with his codefendants and by the charge that he was a murderer as well as a drug dealer.

Third, the extensive preparation for trial to defend against the original CCE offense included review by Petitioner's counsel of 60 days of taped telephonic intercepts, and extensive government evidence obtained in pretrial discovery. These preparations were done with an eye toward defending a CCE charge and related substantive offenses, clearly excluding the Petitioner's involvement in any RICO murder schemes. Even with a casual review of the original indictment one cannot help but notice the obvious absence of the Petitioner from the RICO murder conspiracy and the total involvement of Zagaria as the principal actor in both conspiracies. Clearly, any

pretrial preparations were directed toward defense of the original charges, without fear of disproving the Petitioner's involvement in the alleged narcotics enterprise through murders and murder conspiracies. Suddenly, ten days prior to trial the Petitioner was forced to defend his alleged involvement in the drug conspiracy through, among other things, multiple murders. Both the superseding indictment and the exhibits and evidence of the government's case were that the narcotics enterprise was conducted through multiple murders and gambling. The murders, now the sine qua non of the RICO enterprise, thereby become the lynchpin of the government's case involving the Petitioner in the CCE enterprise. To hold otherwise is to ignore the obvious.

The trial court had several remedies available to it to avoid the prejudicial impact upon the Petitioner as noted by the Court of Appeals. The trial court could have severed the defendant's trial from that of his codefendants. One codefendant, Sinito, had already obtained a continuance indirectly by an interlocutory appeal on grounds of double jeopardy.[2] The Petitioner's case could have been joined with that of Sinito's. Another means of diminishing the prejudicial impact upon the Petitioner would have been to grant his and codefendants Frederick Grawe's and McTaggart's motion for a continuance and to try Grawe, McTaggart and the Petitioner together at a later date. These first two alternatives would not have been burdensome upon the trial court or the government since additional trials were anticipated. A final solution would have been for the District Court to sever the Petitioner from the RICO offense and proceed to trial on the remaining

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2. Sinito's case was eventually returned to the District Court for trial, his double jeopardy claims having been rejected by the Court of Appeals.

counts as originally charged against him and for which he had prepared for trial, carefully excluding evidence of specific RICO predicate acts as to the Petitioner during trial. None of these were attempted by the District Court and, as a result, the Petitioner was prejudiced in his trial on the CCE and substantive offenses.

Severance, pursuant to Rule 14, Federal Rules of Criminal Procedure, is an accepted method of avoiding undue prejudice to a criminal defendant. *United States v. Anderson,* 642 F.2d 281 (9th Cir., 1981), and *United States v. Kopituk,* 690 F.2d 1289 (11th Cir., 1982). A balancing of fairness to a defendant and the interest of the public in avoiding undue litigation is the accepted criteria upon which a trial court must exercise its sound discretion. *See United States v. Isaacs,* 493 F.2d 1124 (7th Cir., 1974), and *United States v. Barrett,* 505 F.2d 1091 (7th Cir., 1974) and *United States v. Anderson, supra.* When the issue of severance is raised, each case must be decided upon its own particular facts and circumstances. *Ungar v. Sarafite,* 376 U.S. 575 (1964).

In a complex case such as presented here, *United States v. Wirsing, supra* provides the proper guidance for the exercise of sound discretion by a Trial Court:

> The court should have considered the complexity of the charges and the possible spillover effect from trying the different types of offenses in a joint trial. If the court was concerned with the possibility of violations of the Speedy Trial Act, the court could have easily proceeded to trial on the conspiracy charge immediately while deferring trial on the tax evasion counts until counsel was given a reasonable amount of time for preparation.

> Alternatively, the court could have granted the motion for a continuance and provided defense counsel with time to prepare a defense on the tax evasion charges. 'Although rulings on motions for continuance are traditionally best left to the trial court's discretion, a judge is not imbued with the power to abrogate a criminal defendant's constitutional rights.' *Id.* at p. 865, citing *United States v. King,* 664 F.2d 1171 at p. 1173 (10th Cir., 1981).

In the present case, the District Court abused its discretion in denying Petitioner's repeated requests for a continuance. A per se denial of the Sixth Amendment right to effective assistance of counsel was the result, thereby denying Petitioner a fair trial with an adequate defense. The Court of Appeals cannot divide the evidence of denial of constitutional rights as to the RICO offense and allow the CCE and substantive charges to remain in view of the inherent relationship of the remaining charges to the RICO offense and the interrelationship of the evidence at trial as to all charges.

Upon this ground alone a writ of certiorari should be granted Petitioner for further review of his case.

II. THE CONCURRENT SENTENCE DOCTRINE CANNOT BE APPLIED TO THE PRESENT CASE, WHERE THE COURT OF APPEALS FOUND THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON A CHARGE OF RICO MURDER, EVIDENCE OF WHICH WAS USED TO PROVE RELATED OFFENSES OF CCE AND SUBSTANTIVE VIOLATIONS.

The Court of Appeals, although reversing the Petitioner's RICO conviction, affirmed his remaining convic-

tions for CCE and related substantive offenses. It did so under the "concurrent sentence" doctrine and upon a finding of no "spill over" from the improper conviction. The issue of "spill over" was treated in Argument I, *supra*, and will not be repeated herein except as necessary to fully brief the present issue.

As noted by Mr. Justice Marshall in *Benton v. Maryland*, 395 U.S. 784 (1969), at p. 789, "One can search throughout these cases and related ones without finding any satisfactory explanation for the concurrent sentence doctrine." Citing *United States v. Hines*, 256 F.2d 561 (2nd Cir., 1958). Despite this threshold condemnation for its very existence the Court of Appeals held that since the Petitioner's life sentence was concurrent to and exceeded that of his reversed RICO sentence he suffered no additional harm on his original convictions and sentences on the CCE charge and substantive offenses; *see United States v. Gallo, supra*, at p. 1524 citing *Barnes v. United States*, 412 U.S. 837 (1973), *United States v. Green*, 588 F.2d 1151 (6th Cir., 1978), *cert. denied*, 440 U.S. 983 (1979), *United States v. Grunsfeld*, 558 F.2d 1231 (6th Cir., 1977), *cert. denied*, 434 U.S. 872 (1977) and *United States v. Burkhart*, 529 F.2d 168 (6th Cir., 1976). However, the decision of *Barnes v. United States, supra*, in reality refers to the concurrent sentence doctrine only as to the ripeness or mootness of a particular issue on appeal and whether or not the court would, in its discretion, accept the question for argument or extend jurisdiction for review. Hence, these authorities are inapplicable to Petitioner's case, especially in light of the inherent reliance of the government upon evidence to convict the Petitioner of CCE and substantive offenses when trial on said evidence, primarily relating to the superseding RICO charge, violated his right to effective assistance of counsel.

Simply put, the issue before the court is not one of mootness but, rather, one of a substantive constitutional violation as a result of the prejudicial effect of forcing the Petitioner to defend himself against multiple murders in a complex narcotic conspiracy case. The Petitioner's case goes not to the simple issue of overlapping sentence but to the underlying evidence used to obtain the convictions on which the sentences were imposed. If the Petitioner was denied the effective assistance of counsel as to the RICO offense, and the government used the identical evidence, without distinction, to obtain convictions for CCE and substantive offenses, the harm suffered by the Petitioner is the resulting conviction and sentences for which he is presently incarcerated. Since the Court of Appeals itself found a constitutional violation as to the prosecution upon the evidence noted, the underlying convictions upon which the Petitioner's sentence stands must themselves fail on appeal. The concurrent sentence doctrine cannot cure this basic underlying flaw in the Petitioner's convictions.

The concurrent sentence doctrine is being distinguished out of existence by several Courts of Appeal. As noted in *United States v. DeBright,* 730 F.2d 1255 (9th Cir., 1984) since ". . . most criminal convictions do, in part, entail adverse collateral legal consequences" (citing *Benton v. Maryland, supra*) blind adherence to the doctrine may well lead to injustice. The Second, Fourth and Seventh Circuits have abandoned the doctrine entirely. *See United States v. Vargas,* 615 F.2d 952 (2nd Cir., 1980), *Close v. United States,* 450 F.2d 152 (4th Cir., 1971), *cert. denied,* 405 U.S. 1068 (1972) and *United States v. Kilpatrick,* 458 F.2d 864 (7th Cir., 1972).

The Fifth Circuit and Eleventh Circuit and District of Columbia Circuit Courts of Appeal automatically vacate

judgments upon which concurrent sentences are imposed if reversible error is first demonstrated as to one or more counts. *See United States v. Cardonar,* 650 F.2d 54 (5th Cir., 1981), *United States v. Butera,* 677 F.2d 1376 (11th Cir., 1982) and *United States v. Hooper,* 432 F.2d 604 (D.C. Cir., 1970). Generally these Courts of Appeal have held that since adverse consequences attach whenever a defendant receives multiple sentences, even if ordered to be served concurrently, the appropriate remedy is to vacate all the convictions. In accord is *United States v. Fishbein,* 446 F.2d 1201 (9th Cir., 1971).

Based upon the modern trend to avoid the adverse and harsh consequences of the concurrent sentence doctrine, the affirmance of the Petitioner's CCE and substantive offense convictions by the Court of Appeals created a particularly unjust result. In essence, the Court of Appeals has told the accused that his right to effective assistance of counsel was violated and that alternately sufficient evidence existed to convict him of all counts. *See Gallo* at pp. 1518-1522. If such evidence existed it did not do so in a vacuum but rather, transcended and overlapped the various offenses charged. That being the case, a Sixth Amendment violation would necessarily affect all the convictions the Petitioner suffered and cannot be remedied by use of the concurrent sentence doctrine.

III. THE PER SE VIOLATION OF 18 U.S.C. 3161(c)(2) THE SPEEDY TRIAL ACT, BY PROCEEDING TO TRIAL ON A SUPERSEDING INDICTMENT LESS THAN 30 DAYS AFTER ARRAIGNMENT WHERE EVIDENCE OF THE NEW OFFENSE WAS USED TO PROVE THE ORIGINAL CHARGES REQUIRES REVERSAL OF THE PETITIONER'S CONVICTIONS.

18 U.S.C. 3161(c)(2), The Speedy Trial Act provides:

> (2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

As noted herein the Petitioner was forced to proceed to trial ten days after arraignment on the superseding indictment. This created a per se violation of the Speedy Trial Act. Numerous cases have interpreted 18 U.S.C. 3161(c)(2) as providing a per se right to the 30 day minimum defense preparation period. *See United States v. Harris,* 724 F.2d 1452 (9th Cir., 1984) which held that Section 3161(c)(2) ". . . guarantees that the defendant is not forced to trial less than thirty days from the date on which the defendant first appears *on the indictment on which the defendant ultimately goes to trial." Id.,* at p. 1455 (emphasis in the original).

The Ninth Circuit's holdings on Section 3161(c)(2) issues are persuasive, to say the least. As noted above *Harris* required a minimum 30 days defense preparation and extended the mandatory 30 day requirement to superseding indictments. In *United States v. Arkus,* 675 F.2d 245 (9th Cir., 1982) and *United States v. Daly,* 716 F.2d

1499 (9th Cir., 1983), *cert. denied,* 104 S. Ct. 1456 (1984), the Ninth Circuit first fashioned the eventual holding of *Harris* and held that the appropriate remedy was a reversal and remand for trial with a firm and decisive instruction to the district courts that Section 3161(c)(2) was mandatory.

Several cases have held that a per se showing of a Section 3161(c)(2) violation requires dismissal of an indictment. *See United States v. McCowan,* 711 F.2d 1441 (9th Cir., 1983), *United States v. Mehrmanesh,* 652 F.2d 766 (9th Cir., 1980) and *United States v. Daly, supra.* However, the more recent trend has been to find a per se violation in superseding indictment situations only where a different offense is charged, *United States v. Harris, supra,* or where a superseding indictment alters the charges or facts alleged in the original indictment. *See United States v. Adu,* No. 84-1106 (9th Cir., Sept. 23, 1985).

Prejudice to the defendant is one of the essential factors a trial court should consider when applying Section 3161(c)(2) to a superseding indictment situation. *See United States v. Horton,* 676 F.2d 1165 (7th Cir., 1983), *United States v. Guzman,* 754 F.2d 482 (2nd Cir., 1985), *United States v. Rush,* 738 F.2d 497 (1st Cir., 1984), *cert. denied,* 105 S. Ct. 1355 (1985), and *United States v. Aviles,* 623 F.2d 1192 (7th Cir., 1980). An adequate opportunity to prepare a defense is the typical ground, when found, upon which a Section 3161(c)(2) per se violation requires dismissal. *See United States v. Harris, supra, United States v. Horton, supra,* and *United States v. Rush, supra.*

Now pending before the Supreme Court is the case of *United States v. Rojas-Contreras,* 730 F.2d 771 (9th Cir., 1984), Supreme Court No. 84-1023, argued October 9,

1985. The *Rojas-Contreras* case asks similar questions on per se Section 3161(c)(2) violations as to superseding indictments and, if not mandating reversal, will certainly establish under what conditions a new trial is required.

Petitioner's case presents a timely inquiry into those very questions. It cannot be doubted that the Petitioner was forced to trial in less than the 30 day minimum defense preparation period. Hence, a per se violation is established. However, the Petitioner's case goes well beyond a technical violation. As noted in Arguments I and II *supra*, the Petitioner was forced to proceed to trial on a new and additional charge for which he did not have adequate time to prepare. Additionally, evidence of the new offenses was used extensively and without limitation to prove the previously filed charges. Previous notice of the government's intention to use evidence of murders and gambling in a complex RICO conspiracy prosecution was not given to the Petitioner who had prepared to defend a complex and involved drug conspiracy prosecution without the RICO charge applying to him.

It cannot be denied, and it was so found by the Court of Appeals, that 10 days was insufficient to meet the charge of RICO murders and gambling. This violation of the Petitioner's statutory right to a 30 day minimum defense preparation period clearly extended to the defense of the CCE and substantive offenses since new RICO charges added an additional dimension of proof thereto which the Petitioner needed to meet head on. This he was unable to do, either by virtue of the mandatory 30 day requirement or under the protection of the Sixth Amendment right to effective assistance of counsel.

CONCLUSION

The Petitioner has demonstrated a unique situation of both constitutional and statutory violations of his right to effective assistance of counsel. Petitioner's case will provide the Supreme Court with a fresh opportunity to define its hold in *United States v. Rojas-Contreras* in light of a flagrant abuse of the right to an adequate preparation period following a superseding indictment which added an additional and completely different offense to the indictment and also in light of a record replete with the use of evidence, without distinction, to prove both the new and previous charges against which the Petitioner had insufficient time to prepare a defense.

For these reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals for the Sixth Circuit

(Decided May 29, 1985)

Nos. 83-3288 to 83-3290, 83-3292, 83-3339, 83-3803 and 83-3804

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOSEPH C. GALLO, FREDERICK GRAEWE, HARTMUT GRAEWE, KEVIN JOSEPH McTAGGART, ANGELO A. LONARDO,
Defendants-Appellants.

Defendants were convicted before the United States District Court for the Northern District of Ohio, John M. Manos, J., on Racketeer Influenced and Corrupt Organization Act, Continuing Criminal Enterprise, and related counts, and they appealed. The Court of Appeals, Wellford, Circuit Judge, held that: (1) evidence supported convictions; (2) appropriate period for defense preparation following superseding indictment is governed by the court's discretion and not by 30-day requirement of Speedy Trial Act; (3) it was prejudicial error to allow only ten or 11 days to prepare a defense to RICO claim contained in superseding indictment; (4) denial of severance was not abuse of discretion; (5) failure to give Rule 105 lim-

iting instructions was not error; (6) one defendant had waived his right to be present at trial; and (7) defendants waived objections to off-the-record "side bar" discussions but such discussions should have been recorded considering the recording mandate of Court Reporters Act.

Affirmed in part and reversed in part.

Alan P. Caplan (argued), Cleveland, Ohio, for Joseph C. Gallo and Kevin Joseph McTaggart.

Donna M. Congini, Cleveland, Ohio, William C. Bryson (argued), Washington, D.C., Steven R. Olah, Donna M. Congeni, Gregory B. English, Asst. U.S. Attys., Cleveland, Ohio, for the U.S.

Edward F. Marek (argued), Public Defender, Cleveland, Ohio, for Frederick Graewe.

Paul Mancino, Jr. (argued), Cleveland, Ohio, for Hartmut Graewe.

Leonard W. Yelsky (argued), Cleveland, Ohio, for Angelo Lonardo.

Before MERRITT, WELLFORD and MILBURN, *Circuit Judges.*

WELLFORD, *Circuit Judge.*

On appeal from their convictions on Racketeer Influenced and Corrupt Organization Act ("RICO"), Continuing Criminal Enterprise ("CCE"), and related counts, Joseph Gallo, Frederick ("Fritz") Graewe, Hartmut ("Hans") Graewe, Kevin McTaggart, and Angelo Lonardo, raise a total of thirty-five issues in the four appellant briefs filed.[1] There are overlapping issues, however, and

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1. Hartmut Graewe filed two briefs written by different lawyers.

We assume the latter of the two superseded the earlier, and therefore have not considered any issue raised in the superseded brief.

we will address how the issues relate to each of the appellants.

Following a jury trial in the United States District Court for the Northern District of Ohio (Manos, J.), the five appellants were convicted on a variety of charges relating to their participation in murder, narcotics distribution, and gambling in the Cleveland, Ohio area. The jury found appellants Gallo, Hans Graewe, and McTaggart guilty of racketeering conspiracy, in violation of 18 U.S.C. § 1962(d) (count 1). The jury also found those three appellants and Lonardo guilty of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848 (count 2). The jury further found all of the appellants, including Fritz Graewe, guilty of aiding racketeering through interstate travel, in violation of 18 U.S.C. § 1952 (counts 3 through 21), possessing cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (count 35), and using the telephone to facilitate a narcotics offense, in violation of 21 U.S.C. § 843(b) (counts 40 through 48, 50 through 51, 53 through 55, and 57 through 58).[2]

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2. In addition to counts 1 and 2, the jury convicted Gallo on counts 11 through 21 (Travel Act counts), count 35 (the cocaine possession count), and counts 44 through 48, 50, 51, 53, 54, 55, 57, and 58 (unlawful telephone use counts). The jury acquitted him on the remaining counts. The jury convicted Fritz Graewe on counts 16 through 21, count 35, and count 58, and acquitted him on the remaining counts. In addition to counts 1 and 2, the jury convicted Hans Graewe on counts 3 through 21 (Travel Act counts), count 35, and counts 40 through 48, 50, 51, 53, 54, 55, 57, and 58 (unlawful telephone use counts). The jury acquitted him on the remaining counts. In addition to counts 1 and 2, the jury convicted McTaggart on counts 3 through 21, count 35, and counts 40 through 48, 50, 51, 53, 54, 55, 57, and 58, and acquitted him on the remaining counts. In addition to count 2, the jury convicted Lonardo on counts 11 through 21 (Travel Act counts) and on counts 44 through 48, 50, 51, 53, 54, 55, 57, and 58 (unlawful telephone use counts). He was acquitted on the remaining counts.

Gallo, Hans Graewe, McTaggart, and Lonardo all were sentenced to life imprisonment on the continuing criminal enterprise count. In addition, Gallo, Hans Graewe, and McTaggart received concurrent sentences of 20 years' imprisonment on the racketeering conspiracy count. On each of the Travel Act counts, the district court sentenced each appellant to consecutive terms of five years' imprisonment. On the cocaine possession count, the court imposed a consecutive sentence of 15 years' imprisonment on appellants Galo, Hans Graewe, and McTaggart, and 10 years' imprisonment on appellant Fritz Graewe. For the unlawful use of the telephone counts, the court imposed consecutive four year terms on Gallo, Hans Graewe, McTaggart, and Lonardo; two years' imprisonment on Fritz Graewe.

All five defendants appeal their convictions and the denial of their motions for new trial, which they filed while the appeal was pending.

I. FACTUAL BACKGROUND

We set out the facts in the light offered by the government and as apparently believed by the jury in reaching its verdicts.

Between 1978 and 1982, appellants and others conspired to control the businesses of gambling[3] and narcotics distribution in the city of Cleveland, Ohio. During that period, they fashioned an agreement between rival criminal factions on the east and west sides of the city, whereby

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3. The illicit gambling allegations related only to the RICO charge and not to the CCE count. Since Lonardo was not indicted on the RICO charge, his role in the illicit gambling operation may not be considered substantive evidence of criminal activity. The facts concerning these activities, however, are relevant to show the relationships among all the parties.

they would jointly control and profit from their control of criminal activities. The evidence indicates that Lonardo was one of the leading directors and investors in the profitable but illicit joint enterprise, that Gallo was a high-level supervisor, and that Hans Graewe, McTaggart, and Fritz Graewe were regular participants in various criminal activities of the enterprise.

The chief witness for the government was Carmen Zagaria, a co-conspirator and coordinator of the enterprise's business activities. He testified in detail about the roles played by defendants and others in narcotics and gambling activities, as well as in violence and intimidation on behalf of the enterprise, which included at least seven murders during the four-year period covered by the indictment. The government called other co-conspirators as witnesses who testified about the criminal activities of the enterprise. The government introduced surveillance evidence and physical and wiretap evidence, which corroborate these witnesses' testimony concerning murders and defendants' roles in gambling and narcotics activities.

In January, 1978, Zagaria started dealing in marijuana. He began with small quantities, buying marijuana in one pound lots and selling it by the ounce, utilizing his tropical fish store on Lorain Avenue in Cleveland as a base of operations. Early in 1978, Zagaria met with Keith Ritson,[4] another marijuana dealer; Zagaria and Ritson agreed to cooperate by supplying each other with marijuana as needed. Ritson told Zagaria that McTaggart was selling cocaine and marijuana for him.

In May 1978, Zagaria sought to expand his marijuana business by finding investors for the business and by pur-

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4. Ritson was later murdered by Hans Graewe prior to trial.

chasing large quantities of marijuana in Florida. He agreed with Ritson to obtain marijuana in large lots, from which he would supply a portion of each shipment to Ritson for local distribution.

At about the same time, Hans Graewe told another co-conspirator, James Coppola, that he was looking for a place to invest some money to make a quick profit. Graewe told Coppola that he had succeeded in "ripping off" one Orville Keith for $20,000 in a narcotics transaction. When Keith realized that he had been "ripped off," he began trying to force Graewe to return his money. Graewe told Coppola that he intended not only to keep the money but also to kill Keith to prevent any further bother about it.[5]

At Coppola's suggestion, Graewe then invested $14,000 of the stolen funds in Zagaria's marijuana business, and Zagaria agreed to pay him $1500 per week on this investment. In addition, Graewe's brother, Fritz Graewe, agreed to sell marijuana for Zagaria. For the next four years, Fritz regularly purchased marijuana from Zagaria's operation for resale; Hans also sold some of Zagaria's marijuana, and he found other drug salesmen for Zagaria's expanding marijuana business.

Several months later, Zagaria repaid $8000 to Hans who said that he was going to buy a farm with the money; in fact, he subsequently acquired a nearby farm. Several months later, Zagaria made another repayment on Graewe's investment by supplying him an ounce of cocaine and an amount of cash. In addition to these payments, Zagaria paid regular installments to Hans as originally agreed.

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5. Hans Graewe carried out his murderous plan in July 1978. Zagaria agreed to assist.

Between 1974 and 1978, James Coppola worked as the overseer of a Barboot[6] game located on Broadview Road in Cleveland. In that capacity, Coppola testified, he was working for the "west side" group, which included Ritson, Brian O'Donnell, McTaggart, and Danny Greene. The game came to an end in 1978 shortly after Danny Greene was killed in a bombing incident.[7]

In the summer of 1978, Thomas Sinito[8] approached Coppola and proposed to start a Barboot game that would be jointly sponsored by the rival groups of the east and west sides of Cleveland. Sinito proposed to "split the money and try to stop all this fighting between the east side and the west side." Sinito was a member of the "east side" group, which controlled gambling on the east side of Cleveland.

The representatives of the west side group, including Zagaria, Ritson, and Hans Graewe, agreed to go along with Sinito's proposal to "end all the fighting and have a mutual gambling operation which would benefit both sides of town, keep everybody happy, and split [sic] the profits." Accordingly, Zagaria, Coppola, Hans Graewe, Ritson, and three other men arranged one night to close down the two competing games. They closed the first game without difficulty, and they took over a second game, which was

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6. Barboot is a dice game in which the players bet against one another and in which the house takes 2½ percent of the winnings as its share.

7. The details of the Danny Greene bombing incident are set forth in *United States v. Licavoli*, 725 F.2d 1040 (6th Cir. 1984).

8. Thomas Sinito was convicted of RICO violations in a separate proceeding. *See United States v. Sinito*, 714 F.2d 143 (6th Cir.1983) (affirming conviction in an unpublished opinion). See also the related cases, *United States v. Sinito*, 723 F.2d 1250 (6th Cir.1983), and *United States v. Sinito*, 750 F.2d 512 (6th Cir.1984).

then being run in downtown Cleveland. Zagaria and Ritson had sledge hammers with them when the group went to close the competing games, but Coppola told them, "We don't need no sledge hammers. These are all old guys." Coppola let the operator of the second game continue to run the game for the next week in order to try to recoup some of his expenses. He told the man, however, that "next week it is ours."

After Coppola's group took over the downtown, Barboot game, the two groups split the profits from the game evenly; in addition, Sinito directed Coppola to give 10 percent of the proceeds to Carmen Basile, the owner of a bar on Cleveland's west side. When Coppola questioned that decision, Sinito replied, "Don't ask questions; just out of respect for the old man, we will give him 10 percent."

In compliance with Sinito's instructions, Coppola began giving Basile 10 percent of the receipts from the Barboot game. Basile, however, regularly charged that he was being cheated, and he and Coppola constantly bickered over the amount of Basile's share. Ultimately, Sinito arranged a meeting to resolve the dispute. Appellant Gallo attended the meeting and told Coppola that Basile was going to supervise Coppola, and that Coppola would be Basile's "underboss." Basile subsequently referred to Gallo and Sinito as "two of my close associates from the east side."

After Coppola, Zagaria, Hans, and their associates took over the Barboot game, Coppola met with Sinito each week to divide up the proceeds from the game. Soon, McTaggart began delivering the "east side's" share of the Barboot money to Sinito. Although McTaggart was not a full partner in the Barboot game, he was regularly given a share of the Barboot receipts.

In August of 1978, Sinito asked Coppola if he knew someone who could handle a "contract" to kill one Harvey Rieger. Sinito said, "We have to get rid of this guy because he knows too much and he is getting ready to go to trial." Coppola then checked with Keith Ritson, who said that he could handle the contract. Coppola reported Ritson's willingness to perform the contract, and Sinito gave Coppola a $2500 advance to give to Ritson for the job. Ritson, however, made no effort to kill Rieger, and as a result, Coppola had to pay back the $2500 advance that Sinito had given him. Sinito then told Coppola that Ritson had defaulted on the contract, and that Coppola "ought to take care of that situation."

During the same period, Ritson told Zagaria that he wanted to attend a clam bake that was being held by members of the east side group, so that he could "kill a few of his old enemies." In particular, Ritson said he wanted to kill James Licavoli and Angelo Lonardo. At about the same time, Ritson suggested that Hans and Zagaria should kill Sinito, but Zagaria refused.

Zagaria, Coppola, and Hans met on a number of occasions to discuss their problems with Ritson. They suspected that Ritson was an informant and feared retaliation if he tried to kill Sinito. In addition, Hans wanted to eliminate Ritson because he wanted to take over Ritson's share in the Barboot game, and because Ritson had "beat him" in a cocaine deal the previous spring. Ultimately, the three men decided to kill Ritson, and they made plans accordingly.

On November 16, 1978, Ritson was invited to Zagaria's pet store on a pretext. Hans and Zagaria were waiting for him there, and Hans shot and killed Ritson after his arrival. After shooting Ritson, Hans commented, "It

looks like I'm back in the Barboot game." Hans then called his brother Fritz to borrow a truck to move Ritson's body. Hans and Zargaria dumped Ritson's body in a local quarry. Hans later told Zagaria that he and his brother Fritz had run a file through the handgun that Hans had used to kill Ritson to avoid identification of the gun as the murder weapon. Coppola assured Sinito that the murder of Ritson had been carried out. Sinito subsequently told Zagaria that he had informed Lonardo that Zagaria was responsible for Ritson's killing. When Zagaria later met Lonardo at a party, Lonardo told him, "I heard a lot of good things about you," and advised him to "be careful."

In 1979, the conspirators arranged to open a craps game on the west side of town. As in the case of the Barboot game, they agreed to split the proceeds between the west side and east side groups. Zagaria, Hans, McTaggart, and Coppola agreed to take one-half of the game proceeds on behalf of the west side, while Sinito and Gallo agreed to sponsor the game on behalf of the east side.

This new gambling operation was run out of a house in Linndale Ohio, as arranged by Fritz and others. Gallo arranged for parking in the area with an associate. This game, however, was closed by the police shortly after it began operations.

One of the operators of the game was Billy Bostic, a west side gambler. Bostic made $2500 on the game while it was in operation, but he claimed to have spent a large sum on the improvements to the house. He therefore refused to share the proceeds with the partners in the game. Zagaria subsequently discussed Bostic's actions with Gallo and Sinito, who also recounted problems with Bostic and several of his associates; Gallo commented that "may-

be they are getting their little organization bigger than we thought." Several of Bostic's associates from the east side, they said, were making accusations about Licavoli and Lonardo and causing trouble. Sinito and Gallo then told Zagaria that Bostic was "a west side problem" and that Zagaria should "take care of your west side problems . . . contact your people and take care of this problem." When Zagaria asked about Bostic's three associates from the east side, Gallo and Sinito said that they would take care of their part of the problem, which was an east side problem. Gallo then said that he would offer $50,000 to anyone on the west side who would kill the three men associated with Bostic.

Zagaria later discussed Bostic with Hans, and in June of 1980, Hans and McTaggart lured Bostic into the basement of Zagaria's pet fish store, where they shot and killed him. At Hans' direction, Fritz then brought Hans his "surgical tools"—a meat cleaver and a large knife—which were used to dismember Bostic's body before disposal of his remains.

Following the failure of the Linndale gambling effort, Zagaria began to suspect that the operators of the Barboot game were cheating him and his partners. With the blessing of Gallo and Sinito, and with the assistance of Hans and McTaggart, Zagaria reorganized and directed the operation of the game. From June 1980 to early 1981, Zagaria ran the game, meeting with McTaggart, Hans, and Coppola on a daily basis, during which period the game was highly profitable. Out of these gambling proceeds, Zagaria paid operating expenses and 10 percent of the gross receipts to Carmen Basile. Remaining profits were divided with representatives of the east side Gallo and Sinito. In addition, Zagaria regularly gave McTaggart $50 to $100 per week from the Barboot receipts.

In the fall of 1980, Sinito and Gallo asked Zagaria to let an east side representative, Phil Bonadonna, work at the Barboot game. Zagaria and Hans agreed to put Bonadonna to work at the game, if Bonadonna could bring in customers. Basile opposed it, and complained to Lonardo about Bonadonna. Zagaria spoke with Sinito and Lonardo about the matter, and Sinito told Zagaria to "respect Carmen Basile," even though Basile was giving them "a headache over the Barboot game." Lonardo later reiterated this instruction, directing Zagaria to "just respect Carmen Basile and don't pay him no attention and at this time just respect him," but told Zagaria to "keep the kid [Bonadonna] working."

Prior to his death, Ritson told Zagaria that McTaggart was one of his marijuana and cocaine "customers." After Ritson's murder, McTaggart obtained his cocaine and marijuana from Coppola, supplied by Zagaria. Ultimately, McTaggart arranged to obtain his supply of drugs directly from Zagaria, for distribution to his own customers. Zagaria then regularly delivered substantial quantities of marijuana and cocaine to McTaggart.

As the drug business expanded, Zagaria began to use a crew of assistants to obtain drugs in Florida and to deliver them to Cleveland. One of Zagaria's assistants testified that he began working for Zagaria in the fall of 1978, and that he soon became a regular "runner" for Zagaria, obtaining marijuana and cocaine in Florida and driving the loads back to Cleveland. In November 1978, Zagaria agreed to buy 100,000 Quaalude (methaqualone) tablets from Sinito, paying $175,000 for them upon resale.

Sinito subsequently arranged to sell bottles of illegally obtained prescription pills to Zagaria for $100 per bottle. The pills included Quaalude and Dilaudid tablets as well

as a variety of barbiturates. Zagaria continued purchasing the pills on a regular basis for the next two years. He met with Sinito each week to make satisfactory arrangements.

In February of 1979, Sinito asked Zagaria whether he was interested in purchasing a large amount of marijuana. Sinito then arranged a meeting between Zagaria and appellant Gallo. Following the meeting, Zagaria had one of his assistants pick up the marijuana and deliver it to a "stash house" he operated on the west side of Cleveland. About a week later, Zagaria paid Gallo and Sinito approximately $60,000 for the marijuana thus supplied.

Shortly thereafter, Gallo and Sinito offered to sell a larger quantity of marijuana to Zagaria. Zagaria purchased the marijuana for approximately $225,000. At that time, Gallo and Sinito proposed to Zagaria that they had some "connections" in Florida from who Zagaria could obtain marijuana. Following that discussion, Sinito and Zagaria, together with several of Zagaria's associates, traveled to Florida to buy marijuana, but were unable to consummate a deal.[9]

In May of 1979, Gallo and Sinito agreed to invest $25,000 in Zagaria's marijuana business; they agreed that in exchange for their investment, Gallo and Sinito would share in the profits from the venture. That night or the next day, Zagaria sent one of his runners to Florida to purchase marijuana with $35,000 of his own money and the $25,000 Gallo investment. That transaction was followed by a series of marijuana purchases by Zagaria and his associates, using funds provided by Gallo and Sinito. Every week for the next two years, Zagaria met with Gallo and

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9. The travel by Sinito and Zagaria in March 1979 formed the basis for the convictions on counts 3 and 4 of the indictment.

Sinito to discuss their marijuana operations and to divide the profits from this ongoing venture. By August of 1979, Zagaria was paying Sinito and Gallo between $2000 and $2500 per week on their investment. Gallo and Sinito then invested another $25,000 in the venture with Zagaria.

In September 1979, Zagaria sent his assistant, Donn Newman, to Florida on three or four occasions to acquire marijuana. Zagaria would have a runner assistant pick up the marijuana and deliver it to one of his "stash houses." Zagaria would then break the marijuana down into one-pound bags for delivery to his dealers.[10]

In October, Newman took $100,000 to Florida to buy marijuana, but $85,000 of the money was stolen by a drug supplier there. When told, Gallo suggested sending McTaggart to Florida to find and to kill the thief. The stolen money, however, was never recovered, and Zagaria looked to Gallo and Sinito for refinancing the narcotics business. Gallo and Sinito agreed to invest more money in the business, but they explained that while the first $25,000 investment had belonged to them personally, the second $25,000 investment had belonged to "the old timers," indicating (to Zagaria) Lonardo. Since Zagaria was responsible for the loss of the $25,000 investment, he was required to pay interest of five percent per week on that money. For their further investment in his marijuana business, they required collateral. The new funds were stolen in a Florida rip-off as well. Zagaria reported the loss to Gallo and Sinito and told them, "We're out of business."

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10. The travel by Newman and by Zagaria's associate, Ed Uscier, to obtain marijuana and deliver cocaine in September and October of 1979 formed the basis for the convictions on counts 5 through 10 of the indictment. The telephone calls made during those trips formed the basis for the convictions on counts 40 through 43.

The next month, Zagaria went to a Cleveland restaurant frequented by Lonardo. Inside, Zagaria encountered Sinito and Lonardo, and spoke with Sinito, who indicated that with collateral, Lonardo would lend him $50,000. When Zagaria offered diamonds as collateral, Sinito returned to and consulted Lonardo; by a nod to Zagaria, Lonardo indicated agreement.

Zagaria then was directed to Gallo's office; Gallo told him that Sinito was "next door picking up the money."[11] Shortly thereafter, Sinito arrived carrying $50,000 in a paper bag. Gallo and Sinito explained that a condition of the loan was that a representative of the "east side" would travel to Florida with Zagaria's agent for the marijuana, and would handle the money. Zagaria paid interest of five percent per week on this new loan, in addition to that due on the prior loans, totalling about $5,000 in interest each week, and in addition to a share of the profits earned.

Zagaria began making interest payments to Gallo and Sinito shortly after the new infusion of funds. Between November 1979 and May 1981, he paid them approximately $340,000 in interest alone, and more than $1,000,000 as their share of the profits from the drug distribution operation, all in periodic cash payments. Often Zagaria would be accompanied by his associates, McTaggart and Hans when he made these payments. Zagaria was responsible for buying and selling the marijuana, but Gallo and Sinito provided him with marijuana suppliers in Florida and dealers in the Cleveland area. Zagaria followed the procedure of sending a "runner" to

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11. The evidence showed that the restaurant frequented by Lonardo was located very close to Gallo's office.

Florida to purchase the marijuana, accompanied by an "east side" representative on the trip.

Zagaria would arrange to pick up the marijuana and place it in a "stash house," where it would be weighed and packaged for distribution to the local dealers. Zagaria had as many as 30 runners working for him on various marijuana trips, each paid about $1,000 per trip.

Gallo was monitored in a phone conversation in December, 1980 with an associate. Gallo discussed selling 1,000 pounds of high-quality marijuana, which "we can pick up in Miami." In the same conversation, Gallo commented that "We need a landing strip of about 6500 feet to import a load of about 12,000 pounds." Zagaria, Gallo, and Sinito did not limit themselves to marijuana dealing; in addition, Zagaria paid Sinito between $90,000 and $100,000 for prescription items. He also paid Sinito and Gallo some $200,000 for Quaalude tablets and over $150,000 for cocaine.

In January of 1980, Zagaria traveled to Florida to try to reclaim some of the money that had been stolen from his drug runners. Gallo and Sinito donated Ronnie Anselmo, one of their associates, to serve as "muscle" for Zagaria's efforts. Although Zagaria failed to get the money back, he was able to arrange additional large shipments of marijuana, both from Florida and from Atlanta, Georgia.[12]

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12. The travel by Zagaria and his associates, Anselmo and Odom, to Florida and Georgia in January 1980 formed the basis of the convictions on counts 11 through 14. The telephone calls between Zagaria, Gallo, and Sinito during that trip formed the basis for the convictions on count 44. The travel by runner William Laszlo to Georgia in May, 1980 to pick up 750 pounds of marijuana formed the basis for the convictions on count 15.

Early in 1980, Zagaria, Gallo, and Sinito flew to Jamaica and contacted a pilot who could fly marijuana into the United States. In addition, they arranged for access to an airstrip at which both marijuana and cocaine could be imported. Zagaria arranged to use an airstrip in Tennessee, where he said the local sheriff "was on our side," adding "we could pay him and land a plane there just about any time we wanted." In September of 1980, one of Zagaria's runners had possession of a rental car used on one of the drug supply trips. Because the car had not been returned to the rental agency, the police seized the car and discovered that it contained narcotics, paraphernalia, and cocaine.[13]

McTaggart, who continued to obtain large amounts of marijuana and cocaine from Zagaria, had a number of dealers who worked under him, and whom he contacted on an almost daily basis. A McTaggart associate testified at trial that McTaggart regularly supplied cocaine and barbiturates to members of the Hells' Angels motorcycle group. Timothy Lindow, a McTaggart dealer, testified that he was looking for work when he got out of prison in early 1979, and that he had asked Coppola about any prospects. Coppola referred him to McTaggart, who agreed to let Lindow sell cocaine and Quaaludes for him. Lindow obtained cocaine and Quaaludes from McTaggart regularly until January 1980, when he was jailed for burglary. During the summer of 1979, however, McTaggart and Hans complained to Zagaria that Lindow owed money for drugs purchased and advised Zagaria they had to "put a little pressure" on Lindow.

After Lindow's release from jail in 1980, Hans and McTaggart met with him, not knowing that Lindow had

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13. The cocaine that was found in the rental car formed the basis for the convictions on count 35 of the indictment.

agreed to cooperate with the FBI. Although Lindow did not tell them about his FBI relationship, McTaggart nonetheless searched Lindow for a hidden recording device when they met, and threatened him by a reminder about "what would happen to people like Keith Ritson." Hans added to those threats by reference to Lindow's wife and children.

Allan Wysocki, involved with William Laszlo, one of Zagaria's dealers in cocaine, was arrested without having paid Laszlo. When released in December 1980, Wysocki was visited by Laszlo along with Hans. Laszlo demanded that Wysocki pay the cocaine debt. When Wysocki said he did not have the money, Hans informed Wysocki that he "definitely wouldn't be walking around the next day" if he failed to find it. In addition to his services as an "enforcer," Hans also recruited drug dealers for Zagaria's operation, including in 1978, Larry Turner operator of a Zagaria "drug house." Hans introduced Zagaria to Gary Young, who became a substantial marijuana dealer for Zagaria.

Like McTaggart, Hans also had frequent conversations with Zagaria concerning drug customers. For instance, Hans and McTaggart spoke to Zagaria about allowing a barmaid named "Utah" to purchase marijuana; Hans subsequently advised Zagaria about another customer who would purchase small amounts of marijuana and LSD.

Gallo and Sinito asked Zagaria in late 1979 if he were interested in joining "the Mafia." Gallo and Sinito then described the organization of the group; that the head of the local Mafia had admitted no new members for 15 years, except themselves. Zagaria said that he had learned Basile was a "made member" of the Mafia, and that other members in Cleveland were Licavoli, the

"boss"; Lonardo the underboss; Gallo and Sinito; Anthony Liberatore; and a sixth member then living in Florida. Basile had said he was the controller of the west side Mafia family, sponsored by Lonardo with respect to his 10 percent interest in the Barboo[illegible] gambling. When Zagaria mentioned Lonardo's name, Sinito and Gallo warned against ever using the name, but rather suggested that he refer to Lonardo and Licavoli as "the oldtimers, the other guys, the old men, anything but their names." In the fall of 1980, Gallo and Sinito spoke with Zagaria once again about joining the Mafia; Sinito intended to take Lonardo's place, and they promised Zagaria that he would be put in charge of all the "soldiers."

Curtis Conley was a competing cocaine distributor, resisting McTaggart's and Hans' pressures to join them. In April 1980, Ronnie Starks, a cocaine dealer for McTaggart and Zagaria reported that Conley wanted to kill them both. In June, Gallo told McTaggart about a contract on his life; at that point Zagaria and McTaggart decided to confront this serious threat. They pretended to purchase cocaine from Conley, but instead shot him to death and stole a pound of cocaine Conley then possessed. Zagaria advised Hans and Gallo about Conley's elimination.

Zagaria also learned that another competitor, David Hardwicke, was trying to sell a kilogram of cocaine in the Cleveland area.[14] Zagaria had dealt previously with Hardwicke. Zagaria and his associates decided to steal the kilogram. At a meeting with Graewes and McTaggart, Fritz suggested choking Hardwicke with a coathanger. Zagaria agreed to share the proceeds from the sale of the stolen cocaine. The conspirators, under the pretext of pur-

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14. Zagaria knew him only as "David," but the man was later identified as David Hardwicke.

chasing the cocaine, lured Hardwicke into a car where Fritz strangled him with a coathanger, and the Graewes and McTaggart shot him. Zagaria took Hardwicke's cocaine and sold it; he later shared the proceeds with each of the murder participants, as agreed. One of Hardwicke's former partners subsequently gave Zagaria a $5,000 discount on a kilogram of cocaine for his services in disposing of Hardwicke.

In November of 1980, one of Zagaria's associates suggested stealing two kilograms of cocaine from Kenny Odom, suspected of a previous substantial theft from Zagaria's organization. Zagaria talked with Hans and McTaggart about this proposal, and they agreed. Fritz and Robert Dumas, another of their associates, would pose as narcotics officers, and would then steal the cocaine in the course of a pretended arrest. McTaggart, Zagaria, and Hans supported Fritz and Dumas at the scene of the subsequent theft. Zagaria paid each of the participants a substantial sum for their efforts in eliminating Odom.[15]

In September 1980, Sinito and Gallo discussed with Zagaria another proposal to steal drugs from a principal supplier, Joseph Giaimo. Zagaria did not initially agree to go along with the plan since Giaimo was supplying large amounts of marijuana, cocaine and Quaaludes for him. Later Gallo and Sinito again discussed with Zagaria "ripping off" Giaimo. They finally agreed to steal a huge quantity of drugs from Giaimo and to kill him in the process. Accordingly, they arranged a marijuana purchase from Giaimo to occur at about the end of the year. They then sent a number of people to Florida to pick up a

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15. The travel of Ed Uscier from Florida to Ohio in November 1980 with the two stolen kilograms of cocaine formed the basis for the convictions on count 16.

load of Giaimo's marijuana. On the first trip, the runners returned from Florida with almost 800 pounds of marijuana.

Gallo and Sinito told Zagaria that from the proceeds of the sale of Giaimo's drugs, Zagaria would be able to pay the entire $124,500 that he still owed to the two "old timers" and would be able to make an additional profit on the transaction. Zagaria contacted Hans and explained the plan to him. On the night of January 17, 1981, Zagaria and Hans lured Giaimo into Zagaria's pet fish store and killed him, bricking the body into a basement wall.[16]

The Giaimo theft enabled the conspirators to obtain marijuana worth more than $500,000, which was shared by the principal participants, including Zagaria, Sinito, Gallo, McTaggart, and the Graewes. Zagaria stored some of the marijuana at Fritz's home until it could be distributed.[17]

In December 1980, Sinito asked Zagaria if he "had room in the pond to put someone," referring to one of Zagaria's drug dealers, David Perrier, who was challenging Lonardo and Licavoli. According to Sinito, Perrier was claiming that he had "buried a lot of people for Lonardo and Licavoli" and wanted payment. Later the same month, Zagaria saw Sinito and Lonardo together at the same restaurant. Sinito approached Zagaria, re-

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16. The plans to "rip off" Giaimo were discussed in several telephone conversations between Zagaria, Gallo, and Sinito, intercepted pursuant to court order. Those recorded conversations included discussions of other narcotics transactions and gambling activities.

17. The travel of Fritz Graewe and three of Zagaria's other associates in connection with the Giaimo "rip off" formed the basis for the convictions on counts 17 through 21. The related telephone calls during that period formed the basis for the convictions on counts 57 and 58.

counted the problems with Perrier, and asked if Zagaria would help. Sinito told Zagaria that Lonardo was so angry at Perrier that he wanted to kill him personally. In response, Zagaria replied that he would help. Sinito returned to Lonardo, who then nodded to Zagaria. Sinito later reported to Zagaria that with the assistance of an east side "muscle" man, he had killed Perrier.

In February 1981, Zagaria met with Basile, who indicated he would tell Lonardo what good work Zagaria had been doing; "you should become a member, and Angelo would be proud." Lonardo later congratulated Zagaria personally for his services; he told Zagaria, "I heard a lot of good things about you. You are doing a good job, and be careful."[18] Later that spring, Gallo again talked with Zagaria about joining the Mafia. If Gallo and Sinito were to be "bosses", when Zagaria joined, he would be an "underboss." Zagaria later told Hans about this conversation; Hans replied that Zagaria should join the group to learn "where everything is coming from."

On May 12, 1981, law enforcement authorities conducted warrant-authorized searches of Zagaria's premises and those of several of his associates. Narcotics, drug paraphernalia, and firearms were discovered at several of the locations, including the residences of Zagaria and the Graewes. Subsequently, Zagaria transferred the day-to-day responsibility for running the drug business to Donn Newman. In August of 1981, Zagaria attended a party for Basile, at which Lonardo was present. Lonardo asked Zagaria how McTaggart was doing. In addition, he informed Zagaria to be careful, and not to wear so much jewelry in public. Sinito later told Zagaria that Lonardo

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18. This is the second occasion on which Lonardo congratulated Zagaria in a similar manner.

had complained about his wearing too much jewelry. In late 1981, during the course of the FBI investigation of the defendants, Hans told one of his associates about his plan to kill two investigating FBI agents. The FBI was also informed that Zagaria was threatening the agents' lives. FBI agents subsequently interviewed Lonardo concerning those reported threats, and Lonardo told them "we wouldn't want that kind of headache."

Cleveland police officers conducted regular surveillance of several defendants for over two years during the pertinent period. Surveillance indicated that Lonardo met with Sinito on a daily basis at regular meeting places. Sinito and Gallo also met regularly, and Gallo joined Lonardo and Sinito at their meetings approximately once each week. Telephone records showed a huge volume of calls between telephones listed to Sinito and those listed to Zagaria, Gallo, and McTaggart. There were also large numbers of calls reflected between Zagaria and McTaggart, and between Hans and Zagaria, Fritz and McTaggart. (The records indicated calls made to and from numbers attributed to the defendants above indicated).

Only Gallo, among appellants, testified and he admitted being aware of Zagaria's narcotics operation, but denied participation in it. He claimed that his dealings with Zagaria involved gems and jewelry. Gallo explained that the comments about marijuana in the tape-recorded conversations referred to his effort to obtain marijuana for a friend who needed it for medicinal purposes.

Fritz offered evidence of witnesses that he held several jobs during the indictment period, and that he had no appreciable sum in his savings account during the time. Hans produced witnesses to discredit the Coast Guard reports regarding the Orville Keith incident. Lonardo called

several witnesses who testified that Lonardo ate five days a week at a local restaurant that was the scene of the meetings about which Zagaria testified. They claimed they had never heard Lonardo discuss drugs, loansharking, or gambling while he was in the restaurant, and said that Lonardo was not present on several of the occasions to which Zagaria referred. McTaggart's father testified that he was visiting with his son in the hospital on the day Conley was killed.

II. DISCUSSION

The five appellants herein raise over thirty issues, which they claim require reversal of their convictions. There is considerable overlap among appellants' claims, and for clarity's sake we will discuss the issues topically making reference as necessary to the facts pertaining individually to appellants' arguments.

A. SUFFICIENCY OF THE EVIDENCE

Each appellant raises the issue of whether the government adduced sufficient evidence to support his conviction. In addressing the sufficiency of the evidence, this Court does not sit as a trier of fact in a *de novo* trial. Rather, the standard of review for claims of insufficient evidence is:

> whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original); *see also United States v. Chagra*, 669 F.2d 241 (5th Cir.), *cert. denied*, 459 U.S. 846, 103 S.Ct. 102, 74 L.Ed.2d 92 (1982). As the

Supreme Court has stated: "It is for [jurors] and not for appellate courts, to say that a particular witness spoke the truth or fabricated a cock-and-bull story." *United States v. Bailey,* 444 U.S. 394, 414-15, 100 S.Ct. 624, 636-37, 62 L.Ed.2d 575 (1980); *United States v. Chagra,* 669 F.2d 241, 257 (5th Cir.), *cert. denied,* 459 U.S. 846, 103 S.Ct. 102, 74 L.Ed.2d 92 (1982). Furthermore, "[c]ircumstantial evidence is entitled to the same weight as direct evidence in this calculus [of determining sufficiency]." *Holland v. United States,* 348 U.S. 121, 140, 75 S.Ct. 127, 137-38, 99 L.Ed. 150 (1954). And, the uncorroborated testimony of an accomplice may support a conviction under federal law. *See Krulewitch v. United States,* 336 U.S. 440, 454, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949) (Jackson, J., concurring); *United States v. McCallie,* 554 F.2d 770, 771-72 (6th Cir.1977); *United States v. Ailstock,* 546 F.2d 1285, 1287-88 (6th Cir.1976). We find each appellant's contention of insufficient evidence of guilt to be without foundation.

1. *Lonardo*

Count 2 of the grand jury's indictment in relevant part alleged that Lonardo:

> did engage in a Continuing Criminal Enterprise in that [he] did violate Title 21, United States Code, Section 841(a)(1) [distribution of Schedule I and II controlled substances]. . . . Section 843(b) [illegal use of telephone] . . . which violations were part of a continuing series of violations of said statutes undertaken by the said defendants in concert with at least five other persons, with respect to whom [Lonardo] occupied a position of organizer, supervisor, and manager. . . .

> It was a further part of the conspiracy that the defendants, co-conspirators, would traffic in illegal drugs on a daily basis. . . . Moreover, ALL DEFENDANTS supervised an operation pursuant to which legal prescription drugs . . . were diverted to the clandestine market. . . .
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> 2. ANGELO LONARDO was a "Boss" in the Cleveland Organized Crime Family, would supervise the efforts of his two trusted subordinates, THOMAS SINITO and JOSEPH GALLO, in said narcotics enterprise conspiracy. These three also filled the roles of financiers and protectors of the enterprise from encroachment by other competing criminal groups. JOSEPH GALLO and THOMAS SINITO would strive to insulate ANGELO LONARDO from criminal liability by serving as the conduit through which his instructions were relayed to the other members of the conspiracy.

The central focus was Lonardo's involvement in drug trafficking; in particular, his role as supervisor, protector, and, financier of the drug operation. Lonardo emphasizes his contention that the evidence, while perhaps indicating involvement in loan sharking and illegal gambling, does not support his involvement in the illicit drug traffic.

Evidence in the record however, does support the government's position that Lonardo was indeed a financier of Zagaria's drug operations. In May of 1979, Zagaria received $25,000 from Joe Gallo and Tommy Sinito as an investment in his drug business. In August they invested another $25,000. In mid-October Zagaria's courier in Florida had nearly $100,000 stolen by a drug supplier. When Zagaria went back to Sinito and Gallo, they informed him that the initial investment had been theirs, but the second

investment had been borrowed from Lonardo. Zagaria borrowed an additional $24,500 from Gallo and Sinito; when he received the money he also received a "payment book" to reflect the weekly interest charged. Zagaria's drug supplier in Florida again stole this money and Zagaria told Sinito and Gallo that "we're out of business."

Sinito responded that if he could come up with collateral, the "old-timers"[19] would be willing to loan an additional $50,000 with "different specifications." After Sinito informed Zagaria of this, during their meeting at a local restaurant, Sinito immediately conferred with Lonardo, also present at the restaurant. After Sinito conferred with Lonardo, he told Zagaria that "they agree, just come up with more collateral, and you will have the money," Lonardo nodded to Zagaria in affirmance.

A few days later Gallo informed Zagaria that "Our buddy [Sinito] was next door[20] picking up the money." Sinito and Gallo gave Zagaria $50,000 but said that an "east side man"[21] would have to accompany Zagaria's man on his trips to Florida. When Zagaria made payments to Sinito and Gallo, he placed them in two bags, one for the "interest" and one for a share of the "profits." Since "specifications" for the loan required the presence of an "east side man," a jury reasonably may have concluded from these circumstances that Lonardo was the genesis

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19. Testimony indicates or clearly implied that the "old-timers" included Lonardo.

20. The evidence indicates that Gallo's office was near the restaurant frequented by Lonardo.

21. Lonardo was of top rank under the evidence in the east side crime family. Keith Ritson [a murder victim], for example, wanted to go to the east side's annual clambake and kill a few of his old enemies: "James Licavoli, Angelo Lonardo, Eugene Ciasuclo, and Calabrese." There is copious other evidence further showing Lonardo's supervisory and managerial role in the east side crime family.

of the "specifications" and the financier of the drug enterprise.

The evidence also indicates that Lonardo was the supervisor of Sinito, clearly implicated in the drug conspiracy. There was more than mere guilt by association (*see United States v. Tolliver*, 541 F.2d 958, 962 (2d Cir. 1976), and *Ong Way Jong v. United States*, 245 F.2d 392 (9th Cir.1957)); the evidence forms the basis for a reasonable jury's conclusion that Sinito's actions were, in fact, orchestrated by Lonardo, and was therefore a valid basis for the CCE count conviction.

The *Pinkerton* doctrine set out in 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), makes each member of a conspiracy responsible for acts in furtherance of the conspiracy committed by his co-conspirators, and therefore considerably hurts Lonardo's sufficiency argument.[22] The court here properly instructed the jury on the theory urged by the government. *See United States v. Murray*, 492 F.2d 178, 187 (9th Cir.1973), *cert. denied*, 419 U.S. 942, 95 S.Ct. 98, 42 L.Ed.2d 87 (1974), *citing United States v. Rosselli*, 432 F.2d 879 (9th Cir.1970), *cert. denied*, 401 U.S. 924, 91 S.Ct. 883, 27 L.Ed.2d 828 (1971).[23] Since copious evidence

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22. The Eleventh Circuit in *United States v. Alvarez*, 755 F.2d 830, 849-50 (11th Cir.1985), noted that a "court need not inquire into the individual culpability of a particular conspirator, so long as the substantive crime was a reasonably foreseeable consequence of the conspiracy." We agree with this characterization of the *Pinkerton* doctrine.

23. There is no requirement that the court use the word "Pinkerton" in its charge to the jury. The court here gave this instruction:

> [if] the defendant under consideration was one of [the conspiracy's] members, then the statements and acts knowingly made and done during such conspiracy and in furtherance of its objects, by any other proven member of the conspiracy, may be considered by the jury as evidence against

(Continued on following page)

against the other co-conspirators exists that shows their involvement in the CCE and in the underlying substantive offenses, the evidence only need show that Lonardo was also a member of the CCE conspiracy, and it was sufficient for that purpose:

> while no direct evidence or formal agreement is necessary to establish a conspiracy . . . there must be proof beyond a reasonable doubt that a conspiracy existed, that the accused knew it, and with that knowledge intentionally joined that conspiracy.

United States v. Bright, 550 F.2d 240, 241-42 (5th Cir. 1977). There was sufficient evidence, giving favorable construction to the government's proof, to satisfy this criterion.

The evidence supports circumstantially that Lonardo was a co-conspirator in the drug operation, and that he was a chief financier. Lonardo, on two separate occasions contributed significant sums of money to the drug operation.[24] After Zagaria had been defrauded of nearly $100,000 in a drug deal; moreover, he met with Sinito in Lonardo's presence, and Sinito said the "old timers" would be willing to lend $50,000 as long as one of their own trusted men was present during any drug purchase,

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Footnote continued—

> the defendant under consideration even though he was not present to hear the statement made or the act done.
>
> This is true because, as stated earlier, a conspiracy is a kind of partnership so that under the law each member is an agent or partner of every other member, and each member is bound by or responsible for the acts and statements of every other member made in pursuance of their unlawful scheme.

Jt.App. at 3259. This comports with *Pinkerton*.

24. Although he emphasizes that he made *loans* to, rather than *investments* in, the drug business, Lonardo never claims he did not know of Zagaria's intended use for the money.

evidencing Lonardo's actual knowledge of Zagaria's illicit drug business. In sum, there is sufficient evidence from which a jury could find that Lonardo was a knowing financier and co-conspirator in the CCE.

Lonardo claims, however, that his single act of investing money in the drug operation is insufficient to make him part of the CCE. There is evidence, on the other hand, that Lonardo committed more than a single act in furtherance of the conspiracy, although the one "loan" to the drug operation would be sufficient to make him part of the CCE. We recognize that:

> For a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate the federal narcotics laws, there must be independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy, or the single act must be one from which such knowledge may be inferred.

United States v. Sperling, 506 F.2d 1323, 1342 (2d Cir. 1974), *quoting United States v. DeNoia*, 451 F.2d 979, 981 (2d Cir.1971). The single act in the instant case, however, is one from which knowledge of a broader conspiracy properly may well be inferred. Lonardo invested substantially in the drug enterprise, and he made the loan contingent upon one of his group's men accompanying Zagaria's man on his shopping expeditions. A network of dealers would reasonably be deemed necessary to dispose of Lonardo's investment alone in illicit drugs. This single act of investing a considerable sum of money in the drug operation is therefore sufficient to prove that Lonardo was a member of the conspiracy. The *Pinkerton* doctrine helps close any gaps in the proof of Lonardo's involvement in other substantive offenses.

In *United States v. Alsobrook,* 620 F.2d 139, 143-44 (6th Cir.), *cert. denied,* 449 U.S. 843, 101 S.Ct. 124, 66 L.Ed.2d 51 (1980), we held that a jury must find that a defendant was aware of the interstate travel which provides federal jurisdiction under the Travel Act, 18 U.S.C. § 1952.[25] *See also United States v. Prince,* 529 F.2d 1108, 1111-12 (6th Cir.), *cert. denied,* 429 U.S. 838, 97 S.Ct. 108, 50 L.Ed.2d 105 (1976); *United States v. Barnes,* 383 F.2d 287 (6th Cir.1967). That Lonardo required an east side man to accompany Zagaria's courier to Florida to pick up his marijuana shipments, sufficiently evidences Lonardo's awareness of the interstate travel involved in the CCE.

Lonardo relies also upon what is known as the "innocent purposes doctrine" in respect to the conspiracy

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25. This court is alone in requiring knowledge of the interstate nexus as a necessary element in the proof of a Travel Act violation. *See United States v. Herrera,* 584 F.2d 1137, 1150 (2d Cir.1978); *United States v. LaFaivre,* 507 F.2d 1288, 1297-98 (4th Cir.1974), *cert. denied,* 420 U.S. 1004, 95 S.Ct. 1446, 43 L.Ed.2d 762 (1975); *United States v. Perrin,* 580 F.2d 730, 737 (5th Cir. 1978), *aff'd,* 444 U.S. 37, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979); *United States v. McPartlin,* 595 F.2d 1321, 1361 (7th Cir.1979), *cert. denied,* 444 U.S. 833, 100 S.Ct. 65, 62 L.Ed.2d 43 (1980); *United States v. Sellaro,* 514 F.2d 114, 120-21 (8th Cir.1973), *cert. denied,* 421 U.S. 1013, 95 S.Ct. 2419, 44 L.Ed.2d 681 (1975); *United States v. Roselli,* 432 F.2d 879, 891 (9th Cir.1970), *cert. denied,* 401 U.S. 924, 91 S.Ct. 883, 27 L.Ed.2d 828 (1971); *United States v. Villano,* 529 F.2d 1046, 1054 (10th Cir.), *cert. denied,* 429 U.S. 953, 96 S.Ct. 3180, 49 L.Ed.2d 1193 (1976).

In *United States v. Yermian,* ..... U.S. ....., 104 S.Ct. 2936, 82 L.Ed.2d 53 (1984), the Supreme Court indicated that knowledge is not necessary to confer jurisdiction under the federal false statement statute, 18 U.S.C. § 1001. *Id.* at 4923 (existence of fact conferring federal jurisdiction "need not be one in the mind of the actor at the time he perpetrated the act made criminal by the federal statute.") This holding may suggest that the basis of the knowledge requirement under the Travel Act may no longer be valid. We need not reach this question, however, because we find sufficient evidence from which a jury reasonably could have found that Lonardo was aware of the interstate travel involved in the conspiracy.

charge. "To establish the intent essential to a conviction for conspiracy the evidence of knowledge must be clear and not equivocal. A suspicion, however strong, is not proof and will not serve in lieu of proof." *United States v. Gutierrez,* 559 F.2d 1278 (5th Cir.1977), quoting *United States v. Pruett,* 551 F.2d 1365 (5th Cir.1977). In *Gutierrez,* $500 of marked money from a government purchase of drugs was found at the residence of the primary defendant's uncle. The court determined that the mere presence of the money, without more, was insufficient to prove a conspiracy between the uncle and nephew because completely innocent actions could have resulted in the presence of the money. The court, therefore, reversed the uncle's conviction. *See also United States v. Leon,* 534 F.2d 667 (6th Cir.1976).

Lonardo argues that the evidence adduced against him is consistent with "innocent" behavior. Lonardo's requiring his own trusted men to accompany Zagaria's drug couriers as a condition to his making a substantial loan in the drug enterprise indicates more than innocent behavior with respect to the investment (or loan as the case may be). Sufficient evidence, therefore, supports Lonardo's conviction on all substantive counts.

2. *Fritz Graewe*

Fritz also claims that sufficient evidence does not exist to support his conviction on counts 16, 17, 18, and 19 (Travel Act counts),[26] count 35 (possession of cocaine with intent to distribute), and count 58 (use of a telephone to facilitate distribution of marijuana).

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26. Graewe does not challenge the sufficiency of the evidence with respect to counts 20 and 21, which charge him with being the person who actually did the interstate traveling.

Even under this court's narrow construction of the Travel Act in *United States v. Alsobrook,* 620 F.2d 139, 143-44 (6th Cir.), *cert. denied,* 449 U.S. 843, 101 S.Ct. 124, 66 L.Ed.2d 51 (1980) (*but see supra* note 25), there is sufficient evidence supporting Fritz's conviction on the Travel Act counts. It is not necessary for a co-conspirator to know the circumstances of each instance of travel or the identity of each traveler-participant in a criminal activity. *See United States v. Prince,* 529 F.2d 1108 (6th Cir.), *cert. denied,* 429 U.S. 838, 97 S.Ct. 108, 50 L.Ed.2d 105 (1976). The evidence shows that Fritz actually participated in the interstate travel on at least two occasions, that he was a regular distributor in the narcotics operation, and that he played a very substantial role as a protector and enforcer of the enterprise. His claims of insufficient proof to sustain the Travel Act convictions are without merit. The *Pinkerton* theory of co-conspirator liability, moreover, sufficiently supports Fritz's conviction on the remaining substantive counts.

3. *Hans Graewe, Joseph Gallo, and Kevin McTaggart*

We also find the contentions of Hans Graewe, Gallo and McTaggart as to sufficiency of the evidence to be without merit because of the substantial evidence in the record supporting their convictions on all counts.

B. THE SPEEDY TRIAL ACT'S THIRTY DAY REQUIREMENT

All appellants and Zagaria were initially indicted on July 8, 1981. Subsequently, Zagaria agreed to enter a plea bargain arrangement and to testify against his alleged co-conspirators. Thereafter, a superseding indictment was returned on October 27, 1981, which changed Zagaria's

status from indicted to unindicted co-conspirator, added Gallo to the RICO count (Count 1), and *withdrew* the predicate offense charging Hans Graewe with the murder of one Ted Waite.

Appellants were arraigned on the superseding indictment on October 28, 1982.[27] The original indictment was dismissed the next day on the government's motion, jury selection began November 8, 1982, and the trial began a week later. Gallo and Hans Graewe each claim the court committed reversible error by failing to grant a 30-day continuance following the superseding indictment. They claim the Federal Speedy Trial Act, 18 U.S.C. §§ 3161(c)(2)[28] and 3161(d)(1)[29] require a new 30 day period after the superseding indictment.

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27. Fritz filed a motion for continuance on November 3, 1982, denied November 5, 1982. Gallo moved for a continuance on November 1, 1982, denied November 3, 1982. We find no indication in the record that other appellants moved for continuance, as claimed by Hans in his brief. We assume for purposes of this appeal, however, that each appellant timely moved for a continuance and was turned down, since the government does not argue to the contrary.

28. 18 U.S.C. § 3161(c)(2) provides:

> Unless the defendants consent in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

29. U.S.C. § 3161(d)(1) provides:

> If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

1. *Joseph Gallo*

The original indictment charged Gallo with engaging in a Continuing Criminal Enterprise, 21 U.S.C. § 848, and numerous substantive violations. The superseding indictment, in addition to these counts, also charged Gallo with RICO violations, 18 U.S.C. §§ 1961-1968.

We note at the outset that the Speedy Trial Act requires a court to provide an additional 30-day period in two situations only. First, when "any indictment or information is dismissed *upon motion of the defendant,*" and second, when "any charge contained in a *complaint* filed against an individual is dismissed or otherwise dropped." (Emphasis added). Here the indictment was dismissed upon the *government's* motion, not upon defendants' motion. Further, an indictment, not a *complaint* was dismissed.[30] Therefore both provisions are inapplicable. We

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30. The terms "indictment," "information," and "complaint" are not synonymous. An "indictment" is a grand jury accusation that a defendant committed a crime. *See* 21 Words and Phrases, *Indictment* 316-333 (1960 & 1984 Supp.). An "information" is an attorney general's or prosecuting attorney's accusation. *See* 21 Words and Phrases, *Information* 610-24 (1960 & 1984 Supp.). And a "complaint" is an accusation filed by a private person or informant. *See* 8 Words and Phrases, *Complaint* 382-85 (1951 & 1984 Supp.).

A review of the rather scanty legislative history behind § 3161(d) provides some insight into the Congress' choice of language:

> If a defendant procures dismissal of an indictment or information, any subsequent indictment or information with respect to that crime and defendant must observe the requirements of subsection (b) and (c).

1974 U.S.Code Cong. and Admin.News, Committee Report on H.R. 17409 at 7401, 7453. Thus subsection (d) refers not to the 30-day minimum, but rather to the 70-day maximum. The language limits this recalculation of the 70-day period only to those situations in which a party other than the government procures the dismissal so that the government cannot avoid the 70-day period merely by dismissing the original indictment and subsequently

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note also that the original indictment was not dismissed until after the defendants had been arraigned under the superseding indictment. Section 3161(d)(2) is limited to situations in which a new indictment, information, or complaint is filed *after* dismissal of the original indictment. Section 3161(d)(2) is therefore inapplicable to the circumstances of this case. We agree with the Second and Seventh Circuits that the appropriate period for preparation by defendants following a *superseding* indictment is governed by the discretion of the district court, and not by the statutory 30-day requirement. *See United States v. Todisio,* 667 F.2d 255, 260 (2d Cir.1981), *cert. denied,* 455 U.S. 906, 102 S.Ct. 1250, 71 L.Ed.2d 444 (1982), and *United States v. Horton,* 676 F.2d 1165, 1170 (7th Cir.1982), *cert. denied,* 459 U.S. 1201, 103 S.Ct. 1184, 75 L.Ed.2d 431 (1983); *see also* Committee on the Administration of the Criminal Law of the Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1979* (1981) at 14 (30-day period does not run anew when a superseding indictment is filed).

That we find the Speedy Trial Act to be inapplicable, however, does not dispose of this issue entirely. Gallo claims that he was denied his due process and effective assistance of counsel rights by the denial of a continuance.

> The denial of a motion for a continuance will not be reversed absent a clear abuse of discretion. De-

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Footnote continued—

obtaining a new indictment. We therefore disagree with the Ninth Circuit, which in *United States v. Harris,* 724 F.2d 1452, 1455 (9th Cir.1984), held that under the Speedy Trial Act a court may not compel a defendant to go to trial until 30 days after the filing of a superseding indictment. We note that the Supreme Court has granted certiorari in a similar Ninth Circuit case, *United States v. Rojas-Contreras,* 730 F.2d 771 (9th Cir. 1984), *cert. granted,* ..... U.S. ....., 105 S.Ct. 1167, 84 L.Ed.2d 319 (1985), in which the Ninth Circuit followed *Harris.*

> nial amounts to a constitutional violation only if there is an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay." To demonstrate reversible error, the defendant must show that the denial resulted in actual prejudice to his defense.

United States v. Mitchell, 744 F.2d 701, 704 (9th Cir. 1984). *See also United States v. Faymore,* 736 F.2d 328 (6th Cir.), *cert. denied,* ..... U.S. ....., 105 S.Ct. 213, 83 L.Ed.2d 143 (1984). The trial judge allowed Gallo only ten or eleven days to prepare a defense to the RICO claim contained in the superseding indictment. We note that granting Gallo's continuance motion would not have jeopardized the government's case against any of the defendants under the 70-day requirement of the Speedy Trial Act, 18 U.S.C. § 3161(c)(1), contrary to the government's argument, because the tolling provisions of sections 3161(h)(7) and (8) of that Act would cure any problems with respect to this 70-day requirement. When defense counsel makes reasonable requests for a continuance in a highly complex case, and is afforded only ten days following arraignment to prepare for trial, the trial judge's denial of the motion constitutes an abuse of discretion and violates the defendant's sixth amendment right to counsel. *Linton v. Perini,* 656 F.2d 207 (6th Cir.1981), *cert. denied,* 454 U.S. 1162, 102 S.Ct. 1036, 71 L.Ed.2d 318 (1982); *see also United States v. Wirsing,* 719 F.2d 859 (6th Cir.1983). We find the situation in these cases to be analogous to Gallo's charge under the RICO count, a complex charge with a prompt request for a continuance and an otherwise unreasonably short time to prepare a defense. We conclude that Gallo has shown prejudice with respect to the RICO charge, and we therefore reverse his conviction on that count.

Given the four months which Gallo's defense counsel had to prepare for the remaining counts in the indictment, however, we find no "spill over" effect from the continuance denial which would taint the remainder of Gallo's convictions. *See United States v. Wirsing,* 719 F.2d 859 (6th Cir.1983). There is no demonstrated prejudice in the government's proceeding to prompt trial on the other charges set out in the original indictment. Since Gallo received a concurrent and longer sentence on the count 2 conviction, the concurrent sentence doctrine preserves Gallo's conviction and sentence on this and the other counts notwithstanding our reversal of his count 1 conviction. *Barnes v. United States,* 412 U.S. 837, 848 n. 16, 93 S.Ct. 2357, 2364 n. 16, 37 L.Ed.2d 380 (1973); *United State v. Greer,* 588 F.2d 1151, 1154 (6th Cir.1978), *cert. denied,* 440 U.S. 983, 99 S.Ct. 1794, 60 L.Ed.2d 244 (1979); *United States v. Grunsfeld,* 558 F.2d 1231, 1242 (6th Cir.), *cert. denied,* 434 U.S. 872, 98 S.Ct. 219, 54 L.Ed.2d 152 (1977); *United States v. Burkhart,* 529 F.2d 168, 169 (6th Cir.1976); *see also Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). We therefore do not find it necessary to remand this case to the district court, despite our setting aside Gallo's RICO conviction.

2. *Hans Graewe*

Hans Graewe also claims violation of due process and effective assistance of counsel right stemming from the trial judge's denial of a continuance following the filing of the superseding indictment. The superseding indictment, however, only affected Hans by eliminating the predicate offense of Ted Waite's murder.

As set out in our discussion of Gallo's similar claim, the Speedy Trial Act does not mandate a 30-day delay between the filing of a superseding indictment and com-

mencement of trial. Unlike Gallo's situation, however, we find no abuse of discretion by the trial judge in denying a continuance to Hans. We believe that the judge properly exercised his discretion in refusing to grant a continuance. *See Morris v. Slappy,* 461 U.S. 1, 7, 103 S.Ct. 1610, 1614, 75 L.Ed.2d 610 (1983) ("broad discretion must be granted trial courts on matters of continuances"). Hans' counsel had almost four months to prepare for the counts contained in the original indictment, with a major predicate offense eliminated in the superseding indictment.[31] Graewe, furthermore, fails to demonstrate any "actual prejudice to his defense" caused by the trial judge's refusal to grant a continuance.

3. *Angelo Londardo, Fritz Graewe, and Kevin McTaggart*

For the reasons already given, we find the trial judge to have acted well within his broad discretion in denying the motions of other appellants for a continuance.

C. SEVERANCE

Denial of a Rule 14 severance will not be disturbed on review unless the district court abused its discretion in denying the motion. *See, e.g., United States v. Williams,* 711 F.2d 748, 750 (6th Cir.), *cert. denied,* ..... U.S. ....., 104 S.Ct. 433, 78 L.Ed.2d 365 (1983); *United States v. Warner,* 690 F.2d 545, 552 (6th Cir.1982); *United States v. Tarnowski,* 583 F.2d 903 (6th Cir.1978), *cert. denied,* 440 U.S. 918, 99 S.Ct. 1238, 59 L.Ed.2d 468 (1979); *United States v. McLaurin,* 557 F.2d 1064 (5th Cir.1977).

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31. Hans' counsel's claim is unpersuasive that the superseding indictment "charged the thrust of the prosecution from an essentially drug trafficking prosecution to a murder permeated prosecution."

To show abuse of discretion in this respect, a defendant must make a strong showing of prejudice. *Williams,* 711 F.2d at 751; *United States v. Davis,* 707 F.2d 880, 883 (6th Cir.1983); *Warner,* 690 F.2d at 552. Specifically, he must show an inability by the jury to separate and to treat distinctively evidence that that is relevant to each particular defendant on trial. *See Williams,* 711 F.2d at 751; *Davis,* 707 F.2d at 883; *McLaurin,* 557 F.2d at 1075. Even if defendant may establish some potential jury confusion, this must be balanced against society's need for speedy and efficient trials. *United States v. Scaife,* 749 F.2d 338 (6th Cir.1984); *Davis,* 707 F.2d at 883. Persons jointly indicted normally should be tried together. *United States v. Stull,* 743 F.2d 439 (6th Cir.1984); *United States v. Licavoli,* 725 F.2d 1040, 1051 (6th Cir.), *cert. denied,* ..... U.S. ....., 104 S.Ct. 3535, 82 L.Ed.2d 840 (1984); *United States v. Dye,* 508 F.2d 1226, 1236 (6th Cir.1974), *cert. denied,* 420 U.S. 974, 95 S.Ct. 1395, 43 L.Ed.2d 653 (1975); *see also United States v. Robinson,* 707 F.2d 872, 879 (6th Cir.1983).

1. *Angelo Lonardo*

Lonardo claims the district court erred by failing to grant his motion for severance. *See* Fed.R.Crim.Proc. 14. This claim raises an issue concerning the effect the court's actions had on the ability of the jury to decide fairly and separately the guilt or innocence of each defendant.

Lonardo claims that the "mass of highly inflammatory testimony concerning the gruesome and brutal murders [charged against the other defendants] would not have been admitted if Appellant were tried alone" (Lonardo's brief at 25). He argues that he has a right not to be tried for violent offenses for which he is not charged, not

to be tried jointly with appellants charged in a similar but allegedly unrelated conspiracy, and not to be tried in a joint trial where substantial prejudice results from a "spillover effect" of evidence relating to other appellants.[32]

Lonardo fails to support his argument for severance with any showing of likely jury confusion or other indicia of prejudice. Rather, he bases his argument on the inflammatory nature of some of the evidence adduced against the other appellants. Merely because inflammatory evidence is admitted against one defendant, not directly involving another codefendant (and with which the other is not charged) does not, in and of itself, show substantial prejudice in the latter's trial. *See United States v. Scaife*, 749 F.2d 338 (6th Cir.1984), in which this court found no abuse of discretion even though evi-

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32. The arguments raised by Lonardo in his severance claim are intimately related to his contention that some of the evidence, especially that relating to the murders, should have been excluded under Rule 403 of the Federal Rules of Evidence. Indeed, the Rule permits a judge to exclude evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

For essentially the reasons we give for not finding improper the denial of Lonardo's Rule 14 motion, we find no abuse of discretion by the trial court in refusing to exclude the evidence on Rule 403 grounds. Clearly in reviewing Rule 403 decisions we must apply an "abuse of discretion" standard. *See e.g., United States v. Friedland*, 660 F.2d 919, 929 (3d Cir.1981), *cert. denied*, 456 U.S. 989, 102 S.Ct. 2268, 73 L.Ed.2d 1283 (1982); *United States v. Authement*, 607 F.2d 1129, 1131 (5th Cir.1979); *United States v. Larios*, 640 F.2d 938, 941 (9th Cir.1981); *United States v. Pomerantz*, 683 F.2d 352 (11th Cir.1982); *Accord United States v. Jenkins*, 525 F.2d 819, 824 (6th Cir.1975). Given the frequently violent nature of crimes committed in furtherance of the illicit activities Congress addressed in its enactment of the RICO and CCE statutes, we do not find an abuse of discretion by the trial court in refusing to exclude under Rule 403 evidence of those violent crimes committed by Lonardo's co-conspirators in furtherance of the CCE.

dence of one defendant's attempted murder of an FBI agent was admitted during a joint trial for robbery and even though the other defendants were not charged with the attempt.

Here, the jury was able to acquit each appellant on some counts and convict them on others. This strongly suggests that the jury was not confused by the testimony adduced at trial, and was able to attribute to each appellant evidence pertinent to that particular party. Absent a clear showing of specific and compelling prejudice resulting from a joint trial, the denial of a motion for severance will not serve as a basis for reversal. *See United States v. Dempsey,* 733 F.2d 392, 398 (6th Cir.), *cert. denied,* ..... U.S. ....., 105 S.Ct. 389, 83 L.Ed.2d 323 (1984); *United States v. Licavoli,* 725 F.2d 1040, 1051 (6th Cir.), *cert. denied,* ..... U.S. ....., 104 S.Ct. 3535, 82 L.Ed.2d 840 (1984); *United States v. Williams,* 711 F.2d 748, 751 (6th Cir.), *cert. denied,* ..... U.S. ....., 104 S.Ct. 433, 78 L.Ed.2d 365 (1983); *United States v. Hamilton,* 689 F.2d 1262, 1275 (6th Cir.1982); *cert. denied,* 459 U.S. 1117, 103 S.Ct. 753, 74 L.Ed.2d 971 (1983). Lonardo has failed to make the strong showing required.

Lonardo further claims that the district court's refusal to sever his trial resulted in a "spillover effect" which may have caused the jury to convict him "not on the basis of evidence relating to [him] but by imputing to [him] guilt based on the activities of the other set of conspirators." *United States v. Tolliver,* 541 F.2d 958, 962 (2d Cir.1976).

> The existence of . . . a "spill-over" or "guilt transference" effect . . . turns in part on whether the numbers of conspiracies and conspirators involved were too great for the jury to give each defendant the

> separate and individual consideration of the evidence against him to which he was entitled.
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> * * * * *
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> Nine persons here were indicted, and six went to trial, virtually the same number we found insufficient in *United States v. Miley*, 513 F.2d 1191, 1209 (2d Cir.1975), to raise a possibility of guilt transference, and far fewer than the 29 persons indicted and 17 tried in *United States v. Bertolotti*, 529 F.2d 149, 156 (2d Cir.1975), or the 32 defendants indicted and 19 tried in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), where a "spill-over" effect was found to exist.

541 F.2d at 962-63. In comparison to *Tolliver* this case involves seven indicted defendants, only five being tried. The authority cited is not a basis for reversal on the "spill-over" effect of failure to sever.

Joinder of cases is permitted when it would promote judicial economy without substantial prejudice to the defendants. Fed.R.Crim.P. 8; *Bruton v. United States*, 391 U.S. 123, 131 n.6, 88 S.Ct. 1620, 1625 n.6, 20 L.Ed.2d 476 (1968). A defendant has no right to a separate trial merely because his likelihood of acquittal would be greater if severance were granted. *United States v. Stirling*, 571 F.2d 708, 733 (2d Cir.), *cert. denied*, 439 U.S. 824, 99 S.Ct. 93, 58 L.Ed.2d 116 (1978); *United States v. Larson*, 526 F.2d 256, 260 (5th Cir.), *cert. denied*, 429 U.S. 839, 97 S.Ct. 110, 50 L.Ed.2d 106 (1976). Absent a showing of substantial prejudice, spillover of evidence from one case to another does not require severance. *United States v. Ricco*, 549 F.2d 264, 270-71 (2d Cir.1977). The burden is upon Lonardo, who has failed to show this substantial prejudice required for reversal.

Lonardo cites *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), to support his contention in this respect, a case involving a serious variance between the indictment charge and the proof adduced by the government. In *Kotteakos* there were eight different conspiracies linked by a single broker at its hub: "the pattern was 'that of separate spokes meeting in a common center,' though . . . without the rim of the wheel to enclose the spokes." *Id.* at 755, 66 S.Ct. at 1243. The indictment, however, had charged only one conspiracy, and the trial judge had instructed the jury "It is one conspiracy, and the question is whether or not each of the defendants, or which of the defendants, are members of that conspiracy." *Id.* at 756, 66 S.Ct. at 1243. The indictment in the instant case does not charge Lonardo with the RICO conspiracy; rather, Lonardo is charged with complicity in a separate CCE conspiracy. The indictment charge, unlike the situation in *Kotteakos,* is not at variance with the government's proof.[33] Thus, *Kotteakos* is inapposite.

Lonardo also relies on *Schaffer v. United States,* 362 U.S. 511, 80 S.Ct. 945, 4 L.Ed.2d 921 (1960), which again involved a joint trial of defendants in a spoke and hub type conspiracy, a scheme to transport stolen goods in interstate commerce. Three separate groups were involved with a common coordinator to transport stolen goods to various states. The conspiracy charges linking the *Schaffer* appellants with the common coordinator were *dropped,* yet the Court found joinder appropriate. In contrast, the conspiracy charge against Lonardo was not dropped, and the proof against the other defendants in the CCE charge

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33. See also *United States v. Bertollotti,* 529 F.2d 149 (2d Cir.1975), for a similar factual situation to that in *Kotteakos.*

were applicable to Lonardo. *Schaffer* is clearly distinguishable.

United States v. Reynolds, 489 F.2d 4 (6th Cir.1973), *cert. denied,* 416 U.S. 988, 94 S.Ct. 2395, 40 L.Ed.2d 766 (1974), and *United States v. Bova,* 493 F.2d 33 (5th Cir. 1974), also cited by Lonardo, deal with a Rule 8(b) misjoinder claim. Lonardo, however, did not claim a Rule 8(b) misjoinder in the proceedings below, and therefore he has failed to preserve this claim on appeal. *United States v. Williams,* 711 F.2d 748, 750 & n. 3 (6th Cir.), *cert. denied,* ..... U.S. ....., 104 S.Ct. 433, 78 L.Ed.2d 365 (1983).

United States v. McLaurin, 557 F.2d 1064 (5th Cir. 1977), involved a trial of 15 defendants together, with common names and nicknames, and still the court found no abuse of discretion in denying a severance. "Defendant's burden of showing prejudice [is] a 'heavy' or 'extremely difficult' burden." *Id.* at 1075. Likewise, *United States v. Tarnowski,* 583 F.2d 903 (6th Cir.1978), *cert. denied,* 440 U.S. 918, 99 S.Ct. 1238, 59 L.Ed.2d 468 (1979), cited by Lonardo, involved a finding of no abuse of discretion in denying a Rule 14 severance motion.

In *United States v. Vinson,* 606 F.2d 149 (6th Cir.1979), *cert. denied,* 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980), the defendants presented a more compelling case of prejudice than in the instant case. The defendants claimed that they were antagonistic toward one another. The court found severance unnecessary "[a]bsent some indication that the antagonism between [them] misled or confused the jury." *Id.* at 154. The court noted "the mere fact that codefendants attempt to blame each other does not compel severance." *Id. United States v. Kendricks,* 623 F.2d 1165, 1168 (6th Cir.1980) (per curiam), in like

fashion held "defendant must show that antagonism between codefendants will mislead or confuse the jury." (One defendant was charged with a crime that the others were not.) There was, nevertheless, no abuse of discretion in denial of a Rule 14 severance. There was no claim of antagonism between the positions of co-defendants in this case.

Finally, *United States v. Ong,* 541 F.2d 331 (2d Cir. 1976), *cert. denied,* 429 U.S. 1075, 97 S.Ct. 814, 50 L.Ed.2d 793 (1977), cited by Lonardo, stands for the proposition that the harmless error rule applies in situations when a separate trial should have been granted to avoid the potential of undue prejudice. We find that no undue prejudice was demonstrated by the district court's denial of the Rule 14 severance in the instant case, and conclude that none of the authority cited by Lonardo persuades us to the contrary.

2. *Fritz Graewe*

Fritz Graewe, unlike Lonardo, was charged in the RICO conspiracy (count 1). He makes a similar argument to that of Lonardo's for new trial based on a failure to sever, because he claims his joinder in count one was made in bad faith and because the district court granted his Rule 29(a) motion for acquittal on the RICO count.

We find no indicia of bad faith in the government's decision to join Fritz in the RICO conspiracy count. The evidence at the very least suggests that Fritz was an accessory after the fact in a number of murders that served as predicate acts for the RICO count.[34] Under the cir-

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34. RICO defines racketeering activity, *inter alia,* as "an act or threat involving murder . . . which is chargeable under state law and punishable by imprisonment for more than one

(Continued on following page)

cumstances, we are not persuaded that the government acted in bad faith in charging him along with other defendants in count 1.

We conclude that Fritz Graewe states a less persuasive case for severance than does Lonardo, and for essentially the same reasons stated in denying Lonardo's claim, the trial judge did not abuse his discretion in denial of severance despite the favorable Rule 29 holding.

D. RULE 105 LIMITING INSTRUCTIONS

Both Lonardo and Fritz claim error in the failure to give Rule 105[35] limiting instructions with respect to certain testimony, which the court admitted, they assert, for purposes of proving the RICO charge not the CCE charge. The government contends that the court's three or four admonitions each day to the jury, directing that jurors consider the evidence separately as to each defendant was sufficiently limiting. In any event, the government contends the evidence was admissible to prove the CCE as well as the RICO charge.

Assuming that the court's general instructions were not the specific mandate required by Rule 105, *see Lubbock*

Footnote continued—

year." 18 U.S.C. § 1961. Under Ohio Rev. Code §§ 2921.32(A) and (B), and 2929.11(B), obstruction of justice is punishable by imprisonment for more than one year. Courts have found obstruction of law enforcement activities concerning listed predicate acts to be predicate acts themselves, we similarly find obstruction of justice concerning predicate acts also to be predicate acts. *See United States v. Welch*, 656 F.2d 1039 (5th Cir.1981), *cert. denied*, 456 U.S. 915, 102 S.Ct. 1767, 72 L.Ed.2d 173 (1982).

35. Rule 105 of the Federal Rules of Evidence provides:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Feed Lots, Inc. v. Iowa Beef Processors, 630 F.2d 250, 266 (5th Cir.1980); and Wright and Graham, 21 *Federal Practice & Procedure* § 5062 (1977 & 1983 Supp.), we consider the alternate argument of the government that Rule 105 instructions are not required if the evidence is relevant, material, and otherwise admissible without limitation against the party requesting the instruction. If certain evidence is admissible against one defendant on one particular count, and the primary purpose of the presentation is to prove that count, a court need not give Rule 105 instructions requested by a codefendant if the evidence is also admissible against the latter as to a completely different count. The trial judge correctly noted that the evidence in controversy here

> may come in to establish an overt act as to the [RICO] conspiracy count [and] it may come in to indicate the in concert relationship with others and [to show] that the enterprise was a continuing enterprise.

Evidence of Lonardo's *supervisory* position over Gallo and Sinito, developed by the government in its proof on the RICO count was also relevant to Lonardo's similar role in the CCE.[36] For the same reasons we reject Fritz's complaints about the court's failure to give Rule 105 limiting instructions in respect to involvement in activities with which other defendants were charged.

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36. We specifically reject Lonardo's contention that evidence presented relative to a co-defendant's purported involvement in a "RICO" conspiracy cannot be used to support a conviction of the other defendant's involvement as charged in a "continuing criminal enterprise." Although the two offenses have separate elements of proof, often a substantial overlap in the evidence offered may exist. *Cf. United States v. Phillips*, 664 F.2d 971, 1033 (5th Cir.1981).

E. ABSENCE AT TRIAL

After the government had rested its case, appellant Hans Graewe became ill and was taken to a local hospital. His attorney was about to conclude his case, and the other defendants about to begin their presentations. Hans was absent for no more than two days. The following colloquy took place between the court and Hans' defense attorney when he first failed to attend the trial:

> The Court: Let the record show earlier this morning the Court was called by the Marshal and told that Mr. Hartmut Graewe was at the City Hospital and was admitted there last night as an emergency patient.
>
> His counsel this morning was told of the call and has talked to Mr. Graewe by phone at the Hospital. . . .
>
> [Defense Counsel]: I have talked with Mr. Graewe at the hospital.
>
> His indication to me is he is prepared at this time to enter a waiver of his presence of the continuing cross-examination of Agent Winslow that I will be conducting.
>
> At this point I will be resting our case, and he has waived his presence in the preparation of the other defendants' cases.
>
> The Court: Let the record so show.
>
> [Prosecutor]: Your Honor, I move for leave of the Court to reopen the Government's case to call Detective Phil Smith.
>
> The Court: The motion is granted.
>
> [Defense Counsel]: Let our objection be noted.

After Graewe returned to court he again became ill and requested permission to absent himself for an additional day. At this point, the following colloquy took place in the judge's chambers:

> [Defense Counsel]: Hartmut Graewe would at this time waive his presence during the rebuttal testimony for the day in order to recuperate and be better prepared to sit for the rest of the trial, specifically closing argument and those type of things. It is his wish that this waiver be accepted and that he be returned to the—do you want to go back to the medical facility at the jail?
>
> Defendant Hartmut Graewe: Yeah.
>
> [Defense Counsel]: He would like to go back to the medical facility at the jail, at County Jail.
>
> The Court: Is this your decision, Mr. Graewe?
>
> Defendant Hartmut Graewe: Pardon me?
>
> The Court: Is this your decision, sir?
>
> Defendant Hartmut Graewe: Yes, sir.
>
> The Court: The Court will grant you the motion. . . .

Jt.App. at 2972.

It is well settled that a defendant can waive his right to be present at trial by voluntarily absenting himself from trial, *see Taylor v. United States*, 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973), by obtaining the court's permission to be absent, *see United States v. Jones*, 514 F.2d 1331 (D.C.Cir.1975), or by failing to make a timely objection to the holding of proceedings in his absence, *see United States v. Brown*, 571 F.2d 980, 987 (6th Cir.1978). Here is

demonstrated a clear example of waiver. We find Hans' argument in this regard entirely baseless. There is no showing of prejudice.

F. OFF THE RECORD CONFERENCES

Numerous times during trial the district judge engaged in dialogue with the attorneys, both for the defendants and for the government, "off the record," but usually out of the jury's hearing.[37] These off-the-record remarks were not transcribed.[38] There is no indication that during the trial any attorney objected to this procedure. To the contrary, when defense attorneys objected to a ruling resulting from off-record discussion, the court permitted the attorneys to go "on record" to state their objections in full.[39] We consider the court's failure to record fully

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37. We note that during the five day period of jury deliberations the judge also made "off the record" remarks to the jury on three occasions. It appears, however, that these comments concerned the jury's physical comfort, and on one occasion a juror's need to visit her dentist. These remarks, no matter how innocuous, should be made on the record, but we find the error to be harmless under the circumstances beyond a reasonable doubt.

38. At oral argument neither side was able to answer whether audio recordings of these discussions were made by the court. For purposes of this appeal we will assume the "off-the-record" dialogues are not now available in any form.

39. The following colloquy is representative of this situation:

> [Defense Counsel]: Object, your Honor.
>
> The Court: Approach the Bench.
>
> (The following proceedings were had at the side bar out of the hearing of the jury.)
>
> (Discussion had off the record.)
>
> The Court: All right. Put whatever you want on the record.
>
> [Defense Counsel]: Your Honor, I rise to object because. . . .

Jt.App. 1951. (No objection was made to the fact that the discussion was not then made a part of the trial record.)

these bench conferences sufficiently troublesome to merit full discussion.

The Court Reporters Act, 28 U.S.C. § 753, states in part:

> (b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and *shall record verbatim* by shorthand or by mechanical means which may be augmented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) *all proceedings in criminal cases had in open court;* (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding.

(Emphasis added). We agree that the Act states a mandatory rule. *See United States v. Renton,* 700 F.2d 154 (5th Cir.1983); *United States v. Selva,* 559 F.2d 1303, 1305 (5th Cir.1977); *United States v. Garner* 581 F.2d 481 (5th Cir.1978). Furthermore, it is the duty of the court, *not* the attorneys, to meet the Act's requirements. *United States v. Garner,* 581 F.2d 481 (5th Cir.1978).

A violation of the recording mandate, however, is not *per se* error, and thus without more does not require reversal. Even the Fifth Circuit's *United States v. Selva,* 559 F.2d 1303 (5th Cir.1977), which most strictly views failure to follow the Act's requirements, does not adopt a *per se* error approach. Rather, *Selva* states two different

standards depending on whether the same counsel represented defendant at trial and on appeal. If the counsel is the same, *Selva* requires an appellant to show hardship and prejudice before a court will find reversible error. A standard less exacting upon defendant applies if appellate counsel were not the trial counsel. In such situations, according to *Selva,* a defendant need only show the absence of "a substantial and significant portion of the record." *See also United States v. Renton,* 700 F.2d 154 (5th Cir.1983).

In some instances the failure of a court to follow the § 753(b) mandate will require reversal. We disagree, however, that a separate, less demanding test need be applied when a defendant is represented by new counsel on appeal. Absent a showing by counsel on appeal of a reasonable but unsuccessful effort to determine the substance of the off-the-record remarks and the nature of a claimed error, reversal is not an appropriate remedy. In any event, we refuse to apply two standards in reviewing § 753(b) problems when it happens that trial counsel and appellate counsel are not the same.[40]

In determining whether hardship or prejudice results from a trial court's failure to record every statement made in "open court," the reviewing court must consider all the circumstances in the record surrounding the omission. Gen-

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40. To apply a different standard as a matter of course may invite counsel to plant the seeds of reversible error during the course of trial, and permit a resourceful defendant to reap the benefit by utilizing a different counsel on appeal. As the Fifth Circuit itself noted in *United States v. Smith,* 591 F.2d 1105, 1109 n. 1 (5th Cir.1979):

> This anomalous [*Selva*] rule seems to invite the manipulation of appellate causes to achieve unmerited reversals.

We do not, however, imply that appellant or his counsel in the instant case engaged in any such improper manipulation.

erally, failure to record comments made by the judge or counsel to the jury will be viewed with greater disfavor than those made during side bar discussions. *See United States v. Sneed,* 527 F.2d 590 (4th Cir.1975); *United States v. Piascik,* 559 F.2d 545, 548 (9th Cir.1977), *cert. denied,* 434 U.S. 1062, 98 S.Ct. 1235, 55 L.Ed.2d 762 (1978). A court's offer to counsel to record objections following an "off-the-record" discussion lessens the risk of prejudice and reversal.[41] *See, e.g. United States v. Metz,* 608 F.2d 147 (5th Cir.1979), *cert. denied,* 449 U.S. 821, 101 S.Ct. 80, 66 L.Ed. 2d 24 (1980); *United States v. Sneed,* 527 F.2d 590 (4th Cir.1975). Compare these with the situation in *United States v. Weiner,* 578 F.2d 757 (9th Cir.), *cert. denied,* 439 U.S. 981, 99 S.Ct. 568, 58 L.Ed.2d 651 (1978).[42]

It is significant that defendants may have waived objections to the court's procedure, even if it failed to comply with the Court Reporters Act above cited. The defendant's

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41. Appellant's counsel argues that some of the recorded objections are so ambiguous and confused that "[t]he realm of speculation reaches mind boggling heights in attempting to divine what procedural matters were discussed, who discussed them, what was said or represented by the parties to this lawsuit, what was said by the court, and what rulings were made." Gallo's and McTaggart's brief at 33.

Our own review of the record, on the other hand, indicates that in most instances the nature and outcome of the off-the-record discussions are clear. The trial judge permitted defense counsel to record objections to his rulings. It is counsel's responsibility to ensure that the record is clear and complete. We find no reversible error in those few instances in which the nature of defendants' objection is not clear, especially absent allegations of the nature of errors the court is claimed to have committed.

42. Appellants do claim that at one point during *voir dire,* Gallo's attorney stated he would like a particular motion made part of the record and the judge replied "[i]t is not necessary for the record." This motion was not demonstrated to involve a prejudicial matter. Thus, although we view the court's refusal to permit the motion to be made part of the record with disfavor, we find this particular instance to be harmless error also.

personal consent or a waiver of claim of error in not recording all proceedings may preclude claims of reversible error. *See United States v. Weiner,* 578 F.2d 757, 789 (9th Cir.), *cert. denied,* 439 U.S. 981, 99 S.Ct. 568, 58 L.Ed.2d 651 (1978); *United States v. Piascik,* 559 F.2d 545, 549-50 (9th Cir.1977), *cert. denied,* 434 U.S. 1062, 98 S.Ct. 1235, 55 L.Ed.2d 762 (1978); *Houston v. United States,* 419 F.2d 30, 34 (5th Cir.1969). Lawyers for defendants in this instance went beyond merely acquiescing in the trial court's procedure; in a number of instances, the directive to "go off the record" came not from the court but from defendant's counsel, without objection from other counsel.[43] We find defendants effectively to have waived objection to the "off-the-record" side bar discussions especially in light of their failure to state any particular substantive errors the court may have made during these discussions. *See United States v. Long,* 419 F.2d 91, 94 (5th Cir.1969) ("in order to require reversal, some specific error or prejudice resulting from failure to record such proceedings must be called to the Court's attention").

With respect to this issue, however, under our supervisory power we strongly "suggest that if the trial court needs to confer with counsel about rulings to be made from the bench the safe course is to excuse the jury or retire to chambers and let the reporter record what takes place." *United States v. Brumley,* 560 F.2d 1268, 1281 (5th Cir. 1977). On the record before us, however, reversible error has not been demonstrated by the unfortunate failure to record all proceedings in the court pertaining to the trial.

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43. We are not impressed by appellants' claim that they were "brain washed" into accepting the court's procedure here.

G. STEERING

Appellants filed motions for new trial claiming that by manipulating the court assignment system the prosecutors had engaged in a pattern of "steering" significant criminal cases to a judge of their choice. We note that in an analogous and related case we held that due process concerns are not implicated by clerical errors resulting in a defendant's being assigned to a different judge than he would have received absent the error. *Sinito v. United States,* 750 F.2d 512 (6th Cir.1984). In *Sinito,* the court noted that "a defendant does not have a right to have his case heard by a particular judge," does not "have the right to have his judge selected by a random draw," and "is not denied due process as a result of the error unless he can point to some resulting prejudice." *Id.* at 515.

> [E]ven if control over the assignment of cases were not observed by the court under the rule, the judges have inherent power to administer the business of the courts in an orderly way. Litigants have no vested right in the order in which cases are assigned for trial; and it is not contended that the judge to whom the case was assigned was in any way disqualified.

Levine v. United States 182 F.2d 556, 559 (8th Cir.1950), *cert. denied,* 340 U.S. 921, 71 S.Ct. 352, 95 L.Ed. 665 (1951).

These cases are clearly dispositive. Appellants do not claim the trial judge was in any way disqualified to hear the case. The district court properly refused to grant appellant's motion for new trial based on this claim.

III. CONCLUSIONS

We have carefully considered the remainder of appellants' numerous arguments and find them to be without merit.

For the above reasons we AFFIRM in full the convictions of appellants Angelo Lonardo, Hartmut Graewe, Frederick Graewe, and Kevin McTaggart. We AFFIRM Joseph Gallo's conviction except that we REVERSE his conviction on count 1 because of the court's failure to accord him sufficient time in which to prepare his defense. Because Gallo's sentence on count 1 was to run concurrently with the longer sentence he received on the remaining counts, however, we do not find it necessary to remand the case to the district court for further proceedings.

Accordingly, we AFFIRM in part and REVERSE in part.